VOLUME 2

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 162

UNITED STATES OF AMERICA, APPELLANT

vs.

E. I. DU PONT DE NEMOURS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

FILED JUNE 23, 1954

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(Memorandum from Mr. Brown to Mr. Richards and Mr. Hines, dated August 6, 1943, and attachment were received in evidence and marked "Government's Exhibit No. 5395.")

Mr. Minicus. I will have to read the letter to establish the authorship of the memorandum:

"The attached memorandum is the result of review by the writer of previous discussions and suggested schedules, in order to be prepared to make a definite recommendation whenever the subject was brought up for discussion.

"The Wilmington sales group have just held a meeting at which this subject and the attached memorandum were reviewed, and recommend that Schedule No. 1 therein be adopted because it best meets our requirements from a sales standpoint and is also the simplest action to take—merely continuing the present schedule below $500,000 and discontinuing it above that point.

"Inasmuch as it may be advisable to take the second step of eliminating quantity discounts entirely, it would seem logical not to introduce a different schedule for what may prove to be a short period when the present schedule adequately meets our requirements."

4891 That is a memorandum from Mr. Charles F. Brown to Mr. Richards and Mr. Hines.

Then the memorandum is Government Exhibit 5023, which we have offered in evidence.

Mr. Gesell. They are a year apart, Mr. Minicus.

Mr. Minicus. They a year apart, but undoubtedly the attached memorandum is the one spoken of in the letter.

Mr. Gesell. I will simply note, your Honor, that I don't know that at all.

Mr. Minicus. The subject matter in the letter and the subject matter in the memorandum are identical. I think we can resolve this question. I don't know whether Mr. Gesell is denying that this is a Du Pont document or whether it was written by a Du Pont official——

The Court. His statement is very clear. He says he doesn't know that the memorandum referred to in the letter is the memorandum you are going to utilize today.

Mr. Minicus. Well, I will go into the memorandum and perhaps the subject matter of the memorandum will be so tied with the subject matter of the letter that it will seem quite obvious that one refers to the other.

The memorandum is headed "Quantity Discounts Post War" and was written at an earlier date than the letter that I state we consider to be a covering letter. Now on the first page of the memorandum, page 4462, we note a tabulation at the be-
4892 ginning of the report which shows the number of accounts, the number of agreement accounts under which Du Pont was making direct sales. We see at the bottom of that that there were

306 agreement accounts. The breakdown preceding it is according to the amount of purchases they made. Attention is invited to the fact that eight companies, eight customers of the Du Pont Company on direct sales purchased over $500,000; 21 purchased between $100,000 and $500,000 annually. There were 306 agreement accounts.

That point is emphasized further on page 2, the sixth paragraph, which reads:

"We have only 4 accounts over $1,000,000—all cigarette accounts. We have 8 accounts over $500,000, including all of the 'big 6' cigarette companies."

Then the last paragraph on the same page:

"We doubt that the competitive angle has very much bearing on selection of the schedule we set up (provided, of course, they meet ours) as past practice has been to offer to pay whatever is necessary in order to cause no loss to customer in whatever portion of business is switched."

The next document is a new exhibit. The defendant has been provided with ample copies. I have here two copies for the Court. The Government offers in evidence Government Exhibit 547. The authorship of this exhibit is not known. This is an exhibit that was drawn from the files of the duPont Company in answer to our discovery. This exhibit sets forth the monthly and yearly sales of Cellophane to the six major cigarette accounts.

4893

(Document setting forth monthly and yearly sales of Cellophane to six major cigarette accounts was received in evidence and marked "Government's Exhibit No. 547.")

Mr. MINICUS. It will be noted from this exhibit that R. J. Reynolds, the largest purchaser from Sylvania, as we have seen, consistently purchased even in greater quantities from Du Pont. In 1945 this exhibit shows Reynolds purchased 2,185,000 pounds from Du Pont and 1,385,200 pounds from Sylvania. So we see here that although Reynolds had become——

Mr. GESELL. Where is that, Mr. Minicus? We cannot find it.

Mr. MINICUS. The total of the Du Pont sales.

Mr. MINICUS. To Sylvania.

Mr. MINICUS. Well, that is already in evidence.

Mr. GESELL. All right, you are tying this into other exhibits.

Mr. MINICUS. I am sorry, I should have pointed that fact out. Our information on the Sylvania purchases by Reynolds refers back to Government Exhibit 414, and we are relating that to the information shown in this exhibit of the purchases from Du Pont. So that we have Sylvania's most important customer certainly in the cigarette field buying far greater amounts from Du Pont for the wrapping of cigarettes.

4894

We also saw that another tobacco company, the American Tobacco Company, was a customer of Sylvania. From this table, taking the year 1945, which is the last full year that the table reports, we see that in that year American bought 474,297 pounds from Sylvania. That information is in 414. And according to the information in the table at hand from Du Pont bought 3,536,532 pounds.

Now, another fact that is quite striking from an examination of this exhibit is that Ligget & Meyers purchased almost 3,000,000 from Du Pont during the year and yet Ligget & Meyers, despite the fact that it is one of the leading cigarette companies in the country, does not appear on Sylvania's list of the first ten purchasers at all, nor does Phillip Morris nor Brown & Williams.

The Government offers in evidence Government Exhibit 5020, appearing at page 4455 of the bound volumes.

(Memorandum from J. E. Hatt to B. M. May, dated May 24, 1943, was received in evidence and marked "Government's Exhibit No. 5020.")

Mr. Minicus. We refer only to the second page of that report, the fourth full paragraph on the page which reads:

"During the past 12 months we have had a total of 287 agreement accounts outstanding on which quantity discounts have been paid. Of these, four accounts have represented the total

4895 number of the concerns receiving a rebate in excess of 7½%

up to a total of 10%. All of these four accounts are cigarette accounts. Also of a total of the 15 largest accounts, there are two more cigarette companies of large size getting quantity discounts of the nature of 4½%. These six cigarette accounts provide over $6,000,000 worth of annual purchases from us which represents a third of our total volume of agreement accounts in dollars."

That concludes the Government's evidence at this point on the control of marketing outlets. If Mr. Gesell has any comments at this time——

Mr. Gesell. No, I would rather not. I think we had better go ahead until we see this unfold.

4896 Mr. Minicus. The third and final point that we are going to advance for discussion under this heading of "Market Control" involves the possession and exercise of a component power; that is, the power to control the quantity and the nature of the product entering the market. The Government's contentions in this regard of power to control supply appear at paragraph 62 of the trial brief, and under the index at Roman I (c).

Now, to date evidence adduced with regard to the participants in the market place and the nature of the market place and the products going into the market place has established certain facts.

Among those is, one, that there existed for this industry to supply those markets only two domestic producers of cellophane. Beyond that imports have been shown to be relative insignificant. 3, that for the calendar year immediately preceding the filing of the complaint; that is, the year 1946, duPont sold approximately 75% of all cellophane available to domestic purchasers. 4, when duPont shut down one of its units during a temporary lull in 1942, production fell from 106,000,000 to 87,000,000 pounds. That evidence is in Government Exhibit 393 in evidence. That the 1941 figure of 106,000,000 pounds was not regained until 1946.

We are about to establish, your Honor, that throughout
4897 this entire period; certainly beginning in 1941 and continuing to the initiation of this action, critical shortages of supply have existed in the market place for these products.

Our initial documents under this subject matter are addressed to the fact that as the dominant producer of cellophane duPont realized that it had imposed upon it a responsibility to furnish an adequate supply. We also contend that these documents will show that the demand for cellophane was sufficiently elastic so that it could be contained, contracted, or expanded within controllable bounds by anyone possessing the power to affect the price for the product. Under that point we will refer to two documents that have previously gone into evidence: to wit, Government Exhibit 415 and Government Exhibit 417.

The **Court**. Did I understand you to say that throughout the entire period or some segment thereof, namely, 1941 to 1947, there were critical shortages in the market, yet at the same time the defendant here is subject to criticism for attempting to supply that market?

Mr. **Minicus**. Not supply the market at all, your Honor. Our position is that whereas this defendant is so dominant in the market, and the market depends upon it for 75% of the supply; it has been totally unable to adequately supply the market.

The **Court**. I am having difficulty getting that. If
4898 there is a critical shortage, then is the defendant being criticized for not supplying?

Mr. **Minicus**. Exactly, your Honor.

The **Court**. Or for supplying?

Mr. **Minicus**. For not supplying; for failing to supply.

Mr. **Gesell**. And in what period, your Honor?

The **Court**. I said between the period of 1941 to 1947, or any segment thereof.

Mr. **Minicus**. That is the period.

Mr. **Gesell**. That sharpens that issue.

Mr. **Minicus**. Now, we have to refer back to two early documents, 415 at page 5624, and Government Exhibit 417, at page 5628.

These are early documents written in 1930 and 1931, and are offered at this time to show the appreciation on duPont's part of its responsibility to supply because of the fact of its dominance at the production level of the industry. I have read Government's Exhibit 415 and I will just take a brief excerpt from what was previously read:

"Imports have been estimated at 36,000 pounds per months, which may be materially reduced if our suit for increase in tariff is favorably decided, thus throwing upon this company a responsibility of supplying the demands for an article of which it is
4899 the exclusive manufacturer in this country."

Now, that was written, of course, before the advent of Sylvania.

Then, again, a somewhat later document, 417, at page 5628, this statement appears:

"This is, of course, particularly a question of sales forecast for this year and next year. Please bear in mind that we can't afford to run short on deliveries."

Now, Government's Exhibit 455, as page 5885, which the Government now offers in evidence, carries that thought further. This document, too, was written in 1930, and is introduced primarily to show duPont's own appreciation of its position in and responsibilities to the particular type of market it was engaged in.

(The paper referred to, a letter from Mr. J. E. Hatt to Mr. B. M. May, dated April 21, 1930, was received in evidence and marked "Government's Exhibit No. 455.")

Mr. Gesell. If I could shorten this, your Honor, I would like to. We haven't any question that duPont recognized the responsibility to produce moistureproof cellophane at all times and to attempt to supply the market, and that it did so attempt, and if that eliminates some of this obvious material, I would be glad to make that concession. It is a patented product which we manufactured and we felt the responsibility and we sought to carry it out.

4900 Mr. Minicus. I think I have passed the point now, your Honor, and I think it has been handled with reasonable brevity.

* * * * * * *

4903 Here is certainly demonstrated the fact that there is a vast reservoir of demand that can be tapped with a reduction of price. In other words, the demand is there. It is always waiting. The price comes down to meet it, and the demand will rush in. The supply has got to take care of it. It has got
4904 to be ready for this increased demand. So there again the power to fix the price in this case is a very important power.

The Court. Fix it upward or downward?

Mr. Minicus. In any direction, your Honor. The courts have repeatedly held it will work either way. If you reduce the price you are going to tremendously advance the demand. If you increase the price you are going to find the demand for cellophane will fall off greatly.

Mr. Gesell. We will concede that we were the only producer at the time of this memorandum, so naturally if we reduced our price, the cellophane price went down; if we put it up, it went up, and we were the only person making it. We reduced it, which seems to me the best——

The Court. I can't see under that factual situation where the price-fixing has pertinence. Of course, if they were the only producer and their price reduction broadened public use and did not affect competition because they were the only one in that field, I can't see the relevancy of the price-fixing feature in that set of circumstances. I could in others, where price-fixing would become a weapon or a vehicle against competitors. But we have no competitors at this time, circa, 1931.

Mr. Gesell. On his theory.

The Court. That is correct.

4905 Mr. Minicus. But when we get to our price-fixing phase of the case which immediately follows it—this is introductory at this stage here and is concerned primarily with the matter of supply and demand—we will show that that sort of situation continued down through the years to the filing of the complaint. This is simply a very early document that does describe the interplay of the factors of supply and demand as they are related to power to set the price, and it was in existence at this time. In the next section we intend to carry it down through the years. Here our interest is only to show this vast reservoir of demand that was always existing for cellophane, depending upon where the price was set.

Mr. Gesell. Your Honor, if Mr. Minicus will tell us what we should have done we would understand this issue. Should we have kept it up? Should we have raised it or should we continue to lower it, or didn't we lower it enough? I don't see how we can come to grips with this part of the case without knowing that.

Mr. Minicus. I am not quarreling in these documents with anything that the duPont Company should or should not have done. I am simply attempting to describe the market existing for this industry at this time through the introduction of these documents as a background for the shortages which developed later. There is nothing in these documents that in any way is condemna-
4906 tory of the duPont price policy at this time.

Mr. Gesell. Well, at any time.

Mr. **Minicus.** I am not discussing prices now, your Honor.

Mr. **Gesell.** We thought you were.

The **Court.** Proceed, sir.

Mr. **Minicus.** Our next point under this heading, your Honor, is that cellophane, and to a lesser degree, caps and bands have been in drastic short supply almost constantly since the year 1941. We have a document earlier admitted into evidence, Government Exhibit No. 83, which is an annual competitive report on cellophane film for the year 1941. The last paragraph on that page dealing with the year 1941 states, as follows:

"Competitively, the situation was abnormal during the second half of the year, both producers being unable to meet demand during the seasonal peak, and for the first time were obliged to allocate business to established customers."

Mr. **Gesell.** Oh, read the paragraph before your comment, because it is based on a Government order.

Mr. **Minicus.** Mr. Gesell has these documents and he can read anything he wants to.

4907 Mr. **Gesell.** I think that is an unfair representation of the document. There were Government orders which he has withdrawn from his case, and they were originally in it, and since we were supplying the Government's needs, they created a shortage and we are entitled to have that brought out.

Mr. **Minicus.** I intend to bring that out in great detail at a later point, your Honor. The only point I am making here now is that established customers for cellophane could not get cellophane in 1941.

The **Court.** Why?

Mr. **Minicus.** It may have been Government order. I would like to carry that thought along. We will keep it in our minds until I reach the conclusion of this shortage picture. There are other things that they will attribute these shortages to. That is the point I am making.

The **Court.** Proceed.

Mr. **Minicus.** I would like to retract my position, your Honor, as long as it has been felt that the Government is withholding something, and the Government has no desire to do that, and I would like to read the entire thing.

* * * * * *

4910 Now, in 1945 Cellophane was still very critically short, had continued short through those years. Now, for the later years the fact that is attributed by the Du Pont Company to this shortage in large degree is the increase in demand for war goods. But it is still quite obvious that in 1943, '44 and '45, the

Du Pont Company was not producing anything like the quantity of Cellophane it had produced in 1941.

Mr. GESELL. Well, now, your Honor, I must interject with respect to this issue because I think this is most unfair. Mr. Minicus knows that his own associates put wood pulp under allocation which completely controlled the amount of production that we could have on Cellophane, that you couldn't get priorities to put in a new Cellophane plant. This says that 50 per cent of our business was going to war uses, and because we did the patriotic thing and sold to war users we failed to supply some of our regular customers. And to be held up here to criticism for that I think is one of the most outrageous things I have heard of in a courtroom. Mr. Minicus is aware of these orders and he is aware of the activities of the Government with respect to this matter, and I do not think this is a proper presentation, and I object to it. I think it is distorted. He has other documents that show it clearly.

Mr. MINICUS. Your Honor, I must confess complete 4911 ignorance of everything Mr. Gesell has said.

The COURT. What, that there was a war?

Mr. MINICUS. I admit the fact of the war, and we are going to cover this matter of the war. I have admitted here that these shortages were attributable in large part to the war. We are not making a point of that. But as far as the effect of these orders or anything else, the allocation of wood pulp, I have no knowledge of it, your Honor, in specific detail. These would seem to be matters of defense. Certainly it cannot be an objection to this document, which was only put into evidence to show that in 1945, four years after 1941, Cellophane was still in critically short supply. Now, there was a war existing, no doubt about that, and there were a lot of other things in short supply at that time, and I am going to cover those things. But as far as any of these other reasons that Mr. Gesell has given us, shortages of raw materials and so on, being the cause of the short supply, I believe they are matters of defense. Certainly I have no knowledge of them.

The COURT. I am not so certain whether I would go along with you that far, that if you want to put a certain connotation on documentary proof circa 1945 in support of an argument that there was a decreased production on the part of Du Pont, and you failed to advise the Court as to what may have been the compelling 4912 reasons, or what you think them to be, even though you do not have the evidence here in the courtroom, I think you are under the compulsion to so inform the Court that you are offering the evidence in the light of the surrounding circumstances that existed as of that time.

Mr. MINICUS. Yes, sir, I will do that.

In or about 1941, the latter part of 1941, I understand, and during that year, Du Pont produced approximately 106,000,000 pounds of cellophane. In the latter part of that year, because of a Government order, Limitation Order L-20, which restricted certain uses most of which, as we have seen here, fell on plain Cellophane, restricted certain uses for Cellophane, there was a temporary lull in the market. Demand slackened for several months. It picked up again in 1942, and in 1942 at the end of the year Cellophane was still in short supply.

During that temporary lull in 1941 Du Pont shut down its Yerkes Plant No. 1 in Buffalo, one of the then seven plants it had in operation. The reason appearing in the documents for that was the temporary lull in the business as the result of Government Order No. L-20.

Now, shortly after that plant shut down, there was also a great demand for what is known as heavy denier rayon yarn. The Government needed heavy denier rayon yarn and finally, through negotiations, which I have not gone into the details of because they are not too pertinent to this case, arranged with
4913 the Du Pont Company to convert the then idle Cellophane plant at Buffalo to heavy denier yarn for use in the linings of automobile tires. The plant was converted to rayon production and never returned to Cellophane production.

Now, those are the simple facts of how to a large degree the Cellophane production fell off from that 106,000,000 pounds to approximately 87,000,000 pounds. We do not charge any misfeasance in that activity at all—simply why the production fell off. The only fact we are making is that the production did fall off, and it fell off drastically because Du Pont shut down the plant, whatever their reason for shutting the plant down and keeping it down was. I don't care about that.

Mr. GESELL. It was a Government order, Mr. Minicus.

Mr. MINICUS. I do not like that connotation. It was not shut down because of a Government order but because of a temporary lull in the demand and later, through arrangements with the Government, it was converted to a rayon plant, after it was shut down. Whether or not it was done by a Government order, which we deny it was, would make no difference. The only thing we are bringing out at this particular time is that a plant was shut down, and there were very critical shortages immediately thereafter for purchases of Cellophane. That is the only point we are making at this time.

Mr. GESELL. Is it suggested that that is the reason for the
4914 shortages, your Honor? He said a moment ago he did not know about the wood pulp allocation. He has an exhibit

here that reveals it, which may be one of the ones he will withdraw later on, but it now bears the number 4038. There isn't any question of the wood pulp situation, and there isn't any question that the Government had increased demands for Cellophane due to the war that we supplied.

The COURT. Proceed, Mr. Minicus.

Mr. MINICUS. The Government offers in evidence Government Exhibit No. 480.

(Cellophane competitive report for the third quarter of the year 1947 was received in evidence and marked "Government's Exhibit No. 480.")

Mr. MINICUS. This is the Cellophane competitive report for the third quarter, that is, the third quarter of the year 1947. There was no war on then. The first sentence of that report says, "Both manufacturers continue to allocate production as demand is still beyond the capacity of the industry."

The Government offers in evidence Government Exhibit 5146 at page 4747. This, your Honor, is a new exhibit. I believe the defendants have copies of it and I hand two copies to the Court. This is a memorandum from W. J. Harte to the various listed members here of the Du Pont organization, dated January 18, 1946.

(Memorandum from W. J. Harte to Messrs. E. C.
4915 Broems, V. C. Clark, R. J. Crowley, C. B. Estabrook, W. C.
Lock, R. E. Sidwell and W. H. Wheat dated January 18, 1946, was received in evidence and marked "Government's Exhibit No. 5146.")

Mr. MINICUS. It reads as follows:

"Since September 1945, we have seen an increase in the quantity of film allocated to direct trade being shipped to converters, at the request of your direct customers.

"This increasing demand for film in converted form, from present direct customers, may be entirely logical but—you should make certain in each individual case in your district that both you and the customer know the facts.

"1. That we, the producer, want to serve our established trade, including converts, to the best of our ability and in line with the best interests of our customers.

"2. During the period of film shortage, we are equitably allocating all available film to our direct and converting trade based on past purchases.

"3. If an account wishes to ship their direct allocation to a converter (for conversion into converted packaging material for their own use) we are agreeable—but cannot handle their direct needs in addition, while allocation exists.

"4. That our converters are being allocated their just share of available film—and should be able to service their established customers to approximately the same percentage of part
4916 use as are we, which, as you know, is considerably higher than during the war years.

"Should the trend continue to grow, questions will naturally come up.

"Is our distribution of film in line with today's demand?

"Should we allocate greater percentage of film to converters?

"Is the direct allocation greater than the trade demands today?

"Attached is a group of accounts in your District for whom we have made shipments to converters. What I would like to know is why certain accounts asked us to ship their direct allocation to converters.

"Has the account a deal with competition to supply plain requirements?

"Was the account an established user of converted material?

"Is the converter giving the account his relative share of film?

"What were the circumstances surrounding?

"Name the converters."

The next document which we offer is Government Exhibit 5155, appearing at page 4776 of the bound volumes. This was earlier withdrawn, that is, it was not offered at an earlier date, and
4917 we offer it at this time. I believe the defendant has copies of it.

(Memorandum from V. S. Clark to W. J. Harte dated April 18, 1946, was received in evidence and marked "Government's Exhibit No. 5155.")

Mr. MINNUS. The purpose of this document is to illustrate through specific instances what the impact was upon the buyers of Cellophane resulting from this shortage. This document is dated April 18, 1946, and is related to the document just read.

(Reading.) "In an endeavor to protect and further the goodwill of duPont, we have had and maintained a policy of equitable distribution based on past purchases. Our facilities are reserved to meet our responsibilities and our obligations to our established customers.

"Consistent with this policy, at no time have we solicited or accepted new business at the expense of our regular or established customers; realizing this would jeopardize our future. This policy has been of inestimable value in strengthening our position with the trade—both duPont and competitive direct users.

"However, since the duPont Company is the largest manufacturer and supplier, most of the ills and inequities in the allocation and distribution of Cellophane are laid at our door-step, even though we are not directly involved or responsible for the condition or inequity that exists.

4918 "While we in the direct sales force can exercise no direct control over the allocation of that portion of our production distributed through indirect channels or converters, nevertheless, we must recognize that converter policies and tactics do have a very definite bearing on our standing or reputation with the trade both now and in the future. Therefore, unless we all earnestly strive to educate all suppliers of duPont Cellophane that we must all work together for the common interest of the industry and lend support to our overall policy of equitable distribution, duPont good-will may be adversely affected and, as a result, our future business may suffer.

"Contrary to our methods of operation, the converting industry has adopted many unsound practices in connection with the distribution of their allotments, which are felt to be detrimental to both the best interests of the duPont Company and the Cellophane industry as a whole. It is evident that their tactics and policies are conveniently geared for their own selfish interests without regard to the future growth of the Cellophane business.

"Listed herewith are some of the practices now evident in converter distribution, which we sincerely believe have and are affecting duPont good-will:

"1. Disregard of obligations to established users of converted Cellophane.

"2. Forcing established users of converted materials to supply direct quota Cellophane for conversion, actually due them from converter allocations. 4919

"3. Creating unfair competitive situations among customers in a given marketing area by soliciting and accepting new business on new items.

"4. Soliciting and accepting new business beyond their ability to supply with subsequent promises of delivery that cannot be met.

"5. Dissemination of erroneous information regarding the Cellophane supply situation.

"6. General practice of pressuring every account to supply Cellophane for conversion, whether new or old.

"7. Indiscriminately blaming duPont for their mistakes and failures.

"A few trade examples or case histories will serve to illustrate the above."

After that I will not read any further.

There are specific instances of particular companies, Whitman Company in chocolates, Blumenthal Brothers in Philadelphia, Landenberger & Company, Planters Nut & Chocolate Company,

Bayuk Cigars, Columbus Noodle & Macaroni Company, and many others, in which it is very dramatically pointed out as to the impact upon the business of these people resulting from this shortage, the ability to obtain sufficient supplies of the product
1920 that their business is dependent upon, and the stratagems to which they have to resort in the market so that they can have sufficient Cellophane to wrap their products in. In other words, this is a continuation of that supply situation.

Then on page 12 of the report, or page 4787, the first complete paragraph reads:

"As mentioned previously, our policy does not permit acceptance of new business at the expense of established users, nor have we accumulated sizeable back-logs of orders for shipment at some indefinite future date. At the present time we are selling a continuance of present restricted usage and stalling off expansion, new items, new developments and new accounts until additional production capacity has been provided and until we are in a position to handle such business. Contrary to our methods, the converters are out actively selling and accepting any and all orders which has created a fictitious picture of the current demands—direct vs. indirect."

The next document, Government Exhibit 179, at page 508 will not be read. It is designed to show that commensurate with this shortage of Cellophane there was running along at the same time a shortage in caps and bands. I am offering Government Exhibit 179 at page 508, with particular reference to the first two paragraphs of the report.

(Letter from T. W. Holland, Manager, Cel-O-Seal Sales, to Mr. Carl A. Lyon, dated December 18, 1945, was received in evidence and marked "Government's Exhibit No. 179.")

4921 Mr. Minicus: Now, in the report read immediately before the last report introduced in evidence, as I stated before, there were the case histories of a great many people that were apparently subject to quite a degree of commercial hardship as a result of their inability to buy Cellophane. They were the established purchasers.

Now, we will shift our view for a moment to persons new to the industry, who are attempting to establish themselves in a new and profitable line of business. The documents we are about to present here have been selected at random. These are only designed to illustrate the patent. Within one of these documents themselves I believe we will find a statement that letters of this nature were a daily occurrence in the duPont Company. And that is the situation that has persisted since 1941 with regard to people who were coming along, that were looking for a new line of business, young men, growing up, trying to get into a line of business, found this business through these shortages absolutely foreclosed to them.

The first is Government Exhibit 5357, at page 5461, which we offer. This is a letter from E. A. Wight to W. C. Lock, both employees of the duPont Company, and is dated March 8, 1946.

Government's Exhibit 5357

(Memorandum from E. A. Wight to W. C. Lock dated March 8, 1946, was received in evidence and marked "Government's Exhibit No. 5357.")

4922 Mr. Minicus. It reads: "As you realize, we are not in a position during this period of shortage to offer encouragement to new converters. As long as we are unable to take care of the requirements of our established customers, we have not felt justified in soliciting new business.

"The very shortage of Cellophane has brought us many, many inquiries from companies who want to go into the converting business. They all see an immediate and fairly substantial market for converted Cellophane and do not realize that this opportunity which they see is not due to lack of converting equipment but to lack of Cellophane. In other words, the opportunity which many might now see in the converting business might very well vanish when all converters are able to get all the Cellophane they want.

"We are trying to properly evaluate all of those people who are inquiring of us against the day when we will be in a position to expand. Without question there will be some who, because of new products they have developed, or strategic geographical location, or because of the very set-up of their organizations, might well make worthwhile additions to our converter group. Therefore, so that we could properly evaluate M. & W., we would like to know as much as we could about their financial backing, the equipment they have, their organization, reputation and what their plans and expectations are.

"We are not quite certain from your letter if both of 4923 the people constituting M. & W. Transparent Bag Company are returned veterans. If they are, we naturally want to cooperate as best we can in line with the broad company policy in this respect. We have had several inquiries from returned veterans, and, in discussing this matter with them either personally or by mail, we feel that we have rendered the best service by suggesting that they consider some kind of business other than Cellophane converting. After all, any small token allotment that might be set up would not enable them to develop a profitable business and such business as they might handle on this very small allotment could well vanish when Cellophane is again in ample supply.

"After acknowledging the letter you had from M. & W., you may wish to turn it over to us for more detailed reply and handling. If so, just send it on and we will write them. In the past few months we have had several inquiries from the coast and we can add M. & W. to this group for further evaluation and consideration when the day comes and we are in a position to solicit new business."

* * * * *

4940 I have just a few more documents in this section, your Honor, and coming to this we shift our perspective still under this heading of the power to control the supply which in turn is under the general heading of "Market Control" to the control of quantity and quality of the product. This point is set up in paragraph 64 of the trial brief and in the index appears at Roman I-C, 1-c. It is primarily concerned with the defendant's ability to affect the quality of these products as they are available to purchasers in the market area.

The Government offers in evidence Government Exhibit 354, appearing at page 884. This is a letter from Mr. L. A. Yerkes to Mr. J. E. Hatt, Manager of the Cellophane Division, and is dated October 26, 1937.

(Letter from L. A. Yerkes to J. E. Hatt, dated October 26, 1937, was received in evidence and marked "Government's Exhibit No. 354.")

Mr. MINICUS. Mr. Yerkes states:

"I know that we have discussed this matter before, but it does seem to me that there are two wide discrepancies in our profit per pound on both P. T., and M. T., and I wonder if a more complete examination of this subject wouldn't improve our position, particularly on the P. T. where our profit position is not as large as it once was.

"For example, are we endeavoring to push the cut-to-size
4941 business or the stock size business? Our profit to date this year on cut-to-size is 10¢ per pound, whereas our profit on stock size sheets is 7¢ a pound. It seems to me that we should endeavor to build up our cut-to-size business instead of cutting it down. I realize that we have gone in the opposite direction by pushing the roll business on which the profit is only 6½¢ a pound, but it is evident on the face of it that every pound that we can put up ourselves as cut to size means at least 2¢ more per pound profit."

The documents already in evidence, your Honor, indicate that in or during the year 1940 duPont discontinued the manufacture and sale of stock size sheets and, as a matter of fact, the duPont list of November 1, 1941 no longer lists quoted prices for stock size sheets. It so happens that the Sylvania price list, which is also in evidence, of the same date, for the first time fails to list stock size sheets.

I continue reading:

"Take the old example of the difference between P. T. and M. T. I notice that our to date figures are almost exactly alike on the costs of these two: total P. T. cost is 27.5 and total M. T. Cost is 27.2, the M. T. begin actually cheaper than the P. T. Of course the profit on the M. T. is twice that on P. T. Shouldn't we therefore endeavor to throw all the P. T. business that we possibly can over to M. T.? This brings up the broad question of
4942 whether we should reduce the price of M. T. a little and either leave P. T. alone or put it up in an endeavor to have all our business in M. T."

* * * * *

4950 Mr. Gesell. If your Honor please, I want to deal first with this question of short supply in the period from 1941 to 1946 about which there was so much discussion yesterday. We have it in evidence that in March, 1941—and I call your Honor's attention to the date, for it was in that year that war broke out—Clinton Plant No. 1 came into production. So that immediately prior to this abnormal war period duPont had brought in another plant. We also have it in evidence that for the 10 years—and I am referring to Exhibit 125—that for the 10 years before the Government restrictions came in duPont's production increased at the compound rate of 15%, a compound rate for 10 years, and immediately prior to the war Clinton No. 1 came in.

Now, let us look at the other end of the war period because we are now being confronted with a charge of inducing a shortage. Immediately after the war period Clinton No. 2 came in, in February, 1947, and we have it in evidence that it takes from 15 to 20 months to construct a plant, and if you figure back from February, 1947 you will see that immediately with V-J Day duPont began the construction of additional capacity; and we have it in evidence that that capacity, Exhibit 109, was built to meet reasonable forecasts of post-war needs.

4951 The Court. What were the specific restrictions imposed during the war period?

Mr. Gesell. That is what I am coming to now, your Honor.

The Court. Very well.

Mr. Gesell. And I would like in that connection to ask if your Honor would take judicial notice of the following orders which are listed on the schedule I will hand to you and to Mr. Minicus and ask to have set out in the transcript without my going through the burden of reading it, if that meets your Honor's pleasure. We would like you to take judicial notice of each of those orders and amendments which I intend to discuss, and we will supply your Honor with copies of those orders as soon as they can be run through the photostatting machine.

The COURT. Tell me this: Were they later published in the Federal Register, do you know?

Mr. GESELL. I don't know, your Honor.

The COURT. Because if they were, that answers the question. I must take judicial notice of them.

Mr. GESELL. I would imagine they were, but I don't know.

Mr. MINICUS. May I state, your Honor, that I think this is documentary evidence in mitigation or defense, and I don't think
it should be imposed upon the plaintiff's case. If they can
4952 establish that these orders are of a nature that the Court
will take judicial notice of them, we withdraw our objection.

Mr. GESELL. Of course, these are orders of Government agencies——

The COURT. I will cut to the quick of the matter. I will take judicial notice of these orders for the purpose of a better understanding of the Government's presentation of its evidence yesterday as to restricted production or so-called shortages. That is my ruling.

(The Government orders referred to by Mr. Gesell are as follows:)

*Wartime Governmental Limitations on the Use of Cellophane and Certain Major Ingredients Essential to Its Manufacture

1. Use of Cellophane. Limitation Order L-20 effective 11/8/41 prohibited many uses for cellophane. Additional uses prohibited by amendments. Amended 1/10/42, 2/14/42, 3/17/42, 6/8/42, 7/22/42, 1/4/43, 2/4/44, 6/9/44, 12/5/44, 4/16/45, Revoked 8/31/45.

2. Wood Pulp, the basic raw material for all types of cellophane: WPF Allocation Order M-93, effective 3/12/42. Amended 8/17/42, 8/27/42, 11/6/42, 6/29/43, 11/29/43, 9/28/44, Revoked 9/30/45.

3. Glycerin, softener for cellophane, essential, for un-
4953 coated cellophane: WPB Order M-58, effective 3/30/42.
Allocation and restriction to monthly use of 70% of 1/12 of
use in 1940. Amended 9/3/42, 12/10/42, Revoked 6/15/43 (Gylcerin transferred from WPB to Food Distribution Admin. Dept. of Agric.). FDO-34 effective 3/24/43. Amended 10/20/43, 1/1/44, 4/1/44, Revoked 5/16/44.

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*Federal Register citations to be furnished later.

4. Ethylene Glycol, softener usable in coated cellophane but not in uncoated cellophane: WPB Allocation Order M-215, effective 9/5/42. Amended 6/25/43. Replaced by Schedule 15 in Order M-300, Revoked 9/30/45.

5. Nitrocellulose, ingredient of most cellophane coatings: WPB Allocation Order M-196, effective 8/6/42. Amended 8/31/42, 2/3/43, Revoked 5/14/43.

6. Phthalate Plasticizers, coating ingredient used in most duPont coating compositions: WPB Allocation Order M-203, effective 8/1/42. Amended 2/6/43, 1/6/44, Revoked 11/2/44. Replaced by Schedule 63 to Order M-300 issued 11/2/44. Amended 5/2/45, Revoked 8/31/45.

7. Ethyl Acetate, coating ingredient used in most duPont coating compositions: WPF Allocation Order M-327, effective
4954 6/7/43. Amended 6/16/43, 8/31/43, Revoked 12/20/44. Replaced by Schedule 76 to Order M-300 issued 12/20/44. Revoked 8/31/45.

8. Toluene, coating ingredient used in most duPont coating compositions: WPB Allocation Order M-34, effective 8/28/41. First effect on cellophane was Amendment No. 1, issued 12/30/41. Subsequent amendments 5/22/42, 7/23/43, Revoked 6/1/44. Replaced by Schedule 21 to Order M-300, revoked 8/31/45.

9. Isobutanol, coating ingredient in some duPont coating compositions: WPF Allocation Order M-159, effective 5/28/42. Amended 11/16/42, 5/26/43, 1/18/44, evoked 11R/7/44. Replaced by Schedule 66 to Order M-300 issued 11/7/44. Revoked 8/31/45.

4955 Mr. Gesell. I am informed by Mr. McGlothlin that they are in the Federal Register and we will give the Federal Register citation to you.

The Court. That will be helpful to me when I come to consider the case, to use the Federal Register as my reference book.

Mr. Gesell. We will endeavor to furnish those.

Now, the first of these orders, L-20, which was in the Government's case and has been withdrawn, which we now have before the Court on notice, was an order which directed specifically that cellophane should not be sold for certain uses. The order was amended, as your Honor will see from the table I have handed you, a number of times, adding additional prohibitions.

The first order covered such matters as razor blades and soap and electrical equipment, matters of that kind. The first amendment, without going through all of them, covered cigarettes, except where foil was not in use, and so forth.

Now, this series of orders resulted in taking away from duPont substantial markets that it had. We have it in evidence, Exhibit

84, that the order L-20 reduced duPont's plain cellophane film sales by 50 per cent, or 10 per cent of the total business, right at the outset. The effect of that order, therefore, was to bring about the substantial reduction, particularly in plain cellophane, which your Honor will see reflected in the schedules the Govern-
4956 ment has offered showing production from year to year.

Now, consider for a moment some of the other orders——

The COURT. Before we pass to those in detail, you have commented on the effect of the orders, and this is an irrelevant question but if you can answer it I would like to have the information, as to why was the restriction put on in the first instance? Why was it a vital material?

Mr. GESELL. Cellophane was using vital materials, your Honor.

The COURT. In its composition?

Mr. GESELL. In its manufacture.

The COURT. I see.

Mr. GESELL. At the outset the war uses for cellophane were not fully recognized. As we saw in the exhibits as time went on the amount of war business grew, and I wish to discuss that in a moment. But I think the original restrictions were designed to cover such matters as raw materials, like chlorine and phenol and glycerine, which were in short supply, and I believe when the order comes out you will see that it actually recites the shortages of some of these raw materials as the reason for the order.

Wood pulp was one of them covered by Order M-93. Your Honor recognizes from the discussions we had at the opening that wood pulp is an essential raw ingredient. That was placed on allocation by the order.

4957 Another extremely important allocation order was M-58, relating to gylcerine. Glycerine is an animal fat product that duPont does not make, and it is an essential softener for plain cellophane, although there are some substitutes that can be used as a softener for moistureproof, and that was under allocation. The order read that in no event could the monthly use be more than 70 per cent of one-half of the 1940 use.

I would like for a moment without going through the others, to simply call your Honor's attention to the fact that there were other shortages of different materials, such as nitrocellulose, ethylene glycol, and we have listed on this schedule only the principal raw materials involved. We have not sought to give you all of the orders which affected the production situation.

We have a good indication of how this operated in Government's Exhibit No. 496 with respect to the gylcerine situation. That exhibit at page 6769 says:

"Glycerine:

"The War Production Board was requested to allocate our January requirements of 7 cars of glycerine or 574,000 pounds. We were allocated 4 cars, or 328,000 pounds; with instructions to use 96,000 pounds from inventory. Inasmuch as this represented a re-
duction of approximately 150,000 pounds from current con-
4958 sumption levels, it was necessary to make following pro-
duction changes to curtail on glycerine consumption:

"(1) Drastically curtail production of plain film.

"(2) Eliminated MT-34 which takes 13.2% glycerol and substituted therefor MT-35 which is not glycerol softened."

And there are other changes indicated which I will not read. But there isn't any doubt from these orders and from these exhibits that the war situation impinged very substantially upon duPont's ability to produce as it did upon the ability of many other people who were making products during this abnormal period.

What about war uses, which is the question your Honor raised a moment ago? DuPont as a management decision determined that it would meet all war uses from whatever amount it could produce. That is shown by the exhibits. And what are some of these war uses? In Exhibits 85 and 86 we see them listed, ration packaging, wrapping of ordnance, gas capes, tobacco, food, drugs, pressure sensitized tape, first aid and lend-lease, various war uses where the preservation of the product or the importance of the product which was ordered by the production authorities made it necessary to supply the full requirements.

And consider from the exhibits how that grew. It averaged 9.5 per cent in '42; in '43, 17 per cent; in '44, 38 percent; and in '45,
50 per cent, according to the exhibits which Mr. Minicus
4959 introduced yesterday. So that you see that cellophane as
far as it was sold to duPont's regular civilian customers was subject to a squeeze from both ends, one one end a drying up of basic raw materials which limited the amount that could be produced, and at the other end a squeeze which took more and more of the production available off for special war uses and away from the civilian markets.

Now, that is what the situation was, and that is what his own exhibits show, and to suggest in the face of this record that those were self-induced shortages by a monopolist who is seeking in some way to take advantage of them is a suggestion which needs no answer.

I would like to go, your Honor, one step further with respect to this problem because this was brought into Mr. Minicus' statement. There was some discussion as to why duPont shut down the Buffalo plant, which was the plant, your Honor will recall, that was converted to the manufacture of Cordura yarn, which was an essential product during the war for tire yarns and airplanes and trucks.

Mr. Minicus has in his possession a letter which he has not introduced from the WPB saying to us that that program has the same importance as escort carriers, aviation, gasoline and synthetic rubber.

Mr. MINICUS. Your Honor, I must take exception to this constant reference to documents that the Government has withdrawn and draw your Honor's attention that it was the 4960 defendant who insisted most strenously before trial of this case that the Government cut down the number of its documents, two of them that were mentioned before, are both documents that the Government withdrew at that time.

Mr. GESELL. Exhibit 32, which is in the case yet, but which he has not yet offered, shows that the statements he made yesterday with respect to this plant are not accurate. And if he wants to put that exhibit in, your Honor, you will have the facts.

Mr. MINICUS. May I point out that Mr. Gesell will have ample opportunity to put these exhibits in on defense.

The COURT. That is not Mr. Gesell's point. His point is that the documents that have been offered by the Government are only a partial reflection of the fact that we are after.

Mr. MINICUS. Your Honor, the Government has been up against the pressure to reduce its number of documents. We have tried to do that, and now we are being pressured from the same side, your Honor, because we have reduced those documents. We feel that this entire business of the plant is immaterial. We did not say that duPont did anything wrong in shutting down that plant. We pointed out that the plant was shut down and the shortages followed.

Mr. GESELL. We had a lot of testimony from Mr. Minicus about the plant yesterday with no exhibit, and I call your Honor's 4961 attention to the fact there is an exhibit which shows the true facts.

The COURT. Well, let me make this statement because I think it has some importance, that the desire of all of us to reduce the documentary proof in this case to a minimum should not stand in the way of finding out what the actual facts are about any particular matter once that matter has been brought to the attention of this Court.

Mr. MINICUS. That is very true, your Honor, but we feel that that document was not important at that time; we never felt that that document would be brought up for discussion; we did not thing it would become material to this case at all. Our position is that that document substantiates exactly the facts that I attempted to give the Court yesterday. Mr. Gesell comes in and talks about a document that is not in evidence and says it does exactly the opposite. Now I think the only way to resolve the thing is for Mr. Gesell to put the document in on defense and show that it substantiates the opposite. I don't agree with Mr. Gesell on this matter that the document supports him and refutes us at all, that the information I gave the Court yesterday was wrong from that document.

Mr. Gesell. Why don't you put the document in evidence if that is the issue?

The Court. I am not going to put it in evidence.

Mr. Gesell. I am talking to Mr. Minicus.
4962 I cannot stand here, your Honor and hear statements made
which we do not believe are true when we know that there are documents available that will put the matter right.

The Court. I do not think as a matter of procedure, Mr. Gesell, that you can force Mr. Minicus to put any particular document into evidence. But I do think you are within the scope of your proper function by issuing a caveat to me that there are other documents which may throw light on the subject matter under discussion.

Mr. Gesell. This is an exhibit he offered back in 1950.

Now, let's take another issue. There are no documents on this, but there was testimony yesterday on it. Cellophane was compared with rayon, and the statement was made to your Honor that the situation in cellophane and rayon are totally different, that rayon, not being a monopolized industry bounced back after the war and that there were no shortages of any critical kind in 1947 and thereafter, whereas in the case of duPont, where there were only two producers of cellophane, the shortage continued. There are no documents on that, your Honor. It was simply Mr. Minicus' statement at page 1793. I had occasion to inquire into that last night, and since we are both apparently testifying on the subject, I simply say he cannot prove it and it is not so.

Now, what I would like to do with respect to this
4963 shortage question, which is clearly a war-time condition
on the basis of these facts that your Honor has noticed, is to see if I can get a better understanding of what issue it is that we are supposed to be meeting in this lawsuit. Yesterday the charge was made that we have brought about through our activities, directly or indirectly, this shortage in the period from '41 to '47, and we were pictured as the old-fashioned kind of monopolist who keeps his prices up, who keeps his supply limited, in order to make monopolistic profits. But I ask your Honor to think back not so long in this trial to the presentation that

was made by the Government with respect to the documents that showed we were constantly putting in new plant, a fact in itself somewhat inconsistent with the charge as to shortages. Let me read you two statements by the Anti-Trust Division at page 1311 of the printed record:

"The first point is that successive expansion of the defendant's productive facilities for cellophane has been effected in anticipation of increased demand, very often far in advance of the actual occurrence of that demand."

The COURT. Who is the author of that statement?

Mr. GESELL. Mr. Minicus. And again at page 1364 of the printed record:

"Our position is that when a company continues to expand,
to take up any slack which may develop between demand and
supply, and double and re-double its capacity so that
4964 there is never any excess, or never intended to be any excess
demand, the natural effect would be to crowd others, or
discourage others from entering into that industry."

4965 Mr. GESELL. After reading these quotations I wanted to
ask this question, and I think we are entitled to an answer
from the Government on it.

Are we charged with putting in capacity in excess of the demand and thereby curbing others from entering the business? which you will recall led your Honor to inquire of Mr. Minicus, "Should I put brakes on this defendant?" and he said yes. Or are we charged with having induced some kind of an artificial shortage here which has lead to conditions in the market which has prevented people from getting all the cellophane they want?

Now, those are so diametrically opposite that I think we are entitled to some answer to it, and I point out to your Honor that the complaint tendered no issue of any kind with respect to this shortage problem. The complaint tendered the precise opposite issue at page 32 and elsewhere, which talked about the fact that even now the defendant was appropriating large sums to expand its facilities, and Mr. Minicus said on his opening just prior to the filing of the complaint duPont had in prospect enormous plans for expansion which would further have entrenched its dominance. That was the issue tendered on the complaint, and I want to know whether that is still the issue.

The COURT. Mr. Minicus, you may accept this suggestion
or not, but why don't you make notes of these things
4966 that you react to and then answer them, instead of answering
them peacemeal?

Mr. MINICUS. I am simply following the procedure that Mr. Gesell has engaged in throughout my discussion of the documents, your Honor.

The **Court.** I think he was only on his feet twice yesterday interrupting you.

Mr. Minicus. I will pursue your Honor's suggestion. Thank you very much.

The **Court.** But understand I want you to make notes, because it is all for my benefit, you see, to get both sides of the picture.

Mr. Minicus. Yes, sir.

The **Court.** So don't remain seated after Mr. Gesell finishes just because I have stopped you at this point.

Mr. Gesell. Now, there were some issues of fact in connection with this shortage question which I think I should deal with, your Honor. One is that duPont has lived all the time in a seller's market where demand has so exceeded the supply that it has gotten soft and sluggish, and that we view shortages as a fortunate accident. Apart from the fact that there is no evidence of that, there is also definite evidence that this has not been a seller's mar-[illegible], and again it is the Government's evidence, and I feel entitled to comment on it. Its evidence shows from 1932 to 1939
4967 that supply was frequently in excess of the demand. Its evidence shows that in 1937 we cancelled the construction of a plant because new business did not develop. Its evidence shows that from time to time immediately prior to the war casting machines were shut down when there was not the demand. That is not a seller's market, and I intend in a moment to show your Honor the figures, competitive promotional activities of this company which give the lie to the suggestion that duPont views as a fortunate accident a shortage condition. We have viewed it as a most unfortunate accident that the Government has sought to curb our continuing expansion to meet the needs of the public. I say to your Honor that if the shortage, as Mr. Minicus stated, is one of the paramount reasons for this litigation, as he stated yesterday, then he bears great responsibility for that shortage, and it shows that the litigation was premised on entirely fallacious concepts of the business, for he said yesterday he had no knowledge of the glycerin and the wood pulp, and the L-20, and the other conditions imposed by the Government which brought about the very shortage he complains of.

Mr. McGlothlin points out that I had failed to mention that these conditions as shown by the Government's evidence brought about a comparable reduction in the production of Sylvania.

One other facet of this problem has to do with the
4968 export question, and the influence of shortages on exports.

We were charged yesterday with using the shortage as an excuse for not exporting. The fact was quite different. Your Honor will recall the testimony and the discussion when Mr. Tulbridy was here; he pointed to a failure to export and asked your Honor to draw the inference that a failure to export was a failure to export because we were returning to old foreign agreements that had been in effect before the war, and I then stated that the shortage and the war restrictions were responsible for our not-expanding exports more in that period, and now we have exhibits that show that conclusively, and they are before the Court. Just to take one or two, 496, the report states, "Unfortunately there have been no further shipments to relieve this situation. Even though the supply were available, shipments could not have been made through lack of shipping space and inability to secure approval of applications for export licenses." That is under a heading entitled "Exports."

There is another one at 498 in 1945 which talks about the necessity of allocating volume for export because of reduced allocations of essential materials. There is another one, "Restriction On the Purchase and Use of Essential Materials Curtailed our Production." There are many more. There is no particular
reason to read them all. We don't view it as a fortunate
4969 accident that, we could not supply our export trade, but
we are entitled to refer to these war-induced shortages if the suggestion is made that our failure to sell was because we were returning to some agreement with a foreign company, in fact, our failure was based upon the shortages that the Government orders induced.

That finishes the discussion your Honor, so far as short supply is concerned.

I want to deal now with the documents relating to these problems of market control, control of output, control of supply, control of technology, control of sales.

The Court: Well, I didn't think he had come to the evidence on the power to control the technology.

Mr. Gesell: I think he did this morning.

Isn't that right?

Mr. Minicus: No, sir, I have not reached the point of the power to control the technology as yet.

Mr. Gesell: Power to control quality, your Honor, is the one he has come to, not technology. I am sorry. What the difference is, I don't know, but we will discuss the power to control quality.

Now, we have in evidence, if your Honor please, a series of very significant reports. They are the so-called competitive reports which run from Exhibit 430 on through on an annual or
semi-annual basis. These reports disclose in detail what
4970 duPont's cellophane management had in mind, how they
thought they were going to get the business, what kind of competitive factors they met in the market, what they did to stimulate demand, what they did with respect to prices, what they

did with respect to outlet, and what they did with respect to supply. They are the day-to-day living report of the conduct of this business. They show clearly, for example, a complete absence of monopolistic intent. They show clearly substantial proof of competition. They contradict completely the amazing suggestion that was made yesterday that the demand was always there waiting for us and that all we had to do was lower the price and it would rush in, and that this business was conducted as one of controllable demand where duPont pulled some magic lever that determined who would buy from it or why they should buy. These are active, living documents that I want to go through with your Honor in detail. There is much in these documents, your Honor, which I am foreclosed under your rulings from discussing, but I believe within the limits that are available—and I will try strictly to stay within those limits—that we will get an insight into the day-to-day thinking of the duPont cellophane management, what its purposes were and how it got the business, and I can't conceive of anything which is of greater significance under the charges of this complaint.

Far from showing status, these reports show an active change
in business subject to many economic and business
4971 developments.

Now, if your Honor will, I would like first of all to turn to No. 431 at page 5678. That is a report for 1929. It calls attention to the fact that during the first quarter of 1929 there had been a substantial increase in duPont's business. It states that the first quarter of 1929 was the largest quarter in sales volume in the history of the Du Pont Cellophane Company. Then I wish to read—and I haven't read much from these documents, your Honor, but I want to now—it says, "The increase in Du Pont's sales during this period can be definitely credited to the following factors," and I would like to take them up one at a time. There is a list here of eight of them, because they epitomize what took place throughout the business of this company during this period and beyond.

The first is "Reductions in Price Which Make the Use of Cellophane Possible on Items Which Heretofore Could Not Stand the Cost of Cellophane." The report states, "These price reductions have forced the importers to stop their practice of giving special price concessions," but there on price, if your Honor please, is a statement that by reducing prices it has been possible to expand the market to sell where the product could not previously be sold.

* * * *

4973 "2. Consistent improvement in the quality of cellophane produced: Actual tests by manufacturers have convinced them that the quality of cellophane is superior to the imported material."

We improved quality. That is not a static thing. That takes hard work and brains and money, and certainly reduction in prices is not static.

"3. Increased selling force has brought about more complete coverage of the trade."

We had more people going out beating the bushes, if your Honor please, to get business.

"4. Development of a moistureproof sheet has enabled us to regain business from our competitors and develop new business particularly in those industries which require a moisture-retaining or repellant wrapping material."

So we invented a new product. That took brains and initiative and was not static. And that product got us business back that we had lost to our competitors.

"5. Promoting development of automatic wrapping machines to wrap packages in cellophane. Machine wrapping requires roll cellophane which we could supply and our competitors could not supply. Not only is an economy affected, in labor operation, but also in cost, as roll cellophane is cheaper than sheet stock. This forced competition out of the field of big business."

4974 Cigarette companies had to have rolls to run through their machines to package the millions and millions and millions of cigarettes they were turning out, and we promoted the development of automatic wrapping machines. That took effort, it took initiative, and it is again nothing very static.

Then let us take the sixth—

Mr. MINICUS. I would like to point out to your Honor that in repeated anti-trust cases the type of evidence that is now being put in has been repeatedly ruled immaterial and irrelevant to the issues in Section 2 cases.

The COURT. Mr. Gesell has not put this evidence in; you have put it in.

Mr. MINICUS. I did not read from these pages at the present time, your Honor.

The COURT. But they are your documents.

Mr. MINICUS. They are my documents but I told you specifically when I put these documents in that the Government would use them as source material and have reference to the particular parts which they were using. I only say that at this time the type of evidence that Mr. Gesell is reading into the record has been repeatedly held to be immaterial to a Section 2 case. Good intentions are not a defense to the anti-trust laws.

Mr. Gesell. This has nothing to do with the good intentions, your Honor.

The Court. State your purpose, and then I will rule
4975 on the objection.

Mr. Gesell: My purpose is to show that duPont obtained the position that it has in the cellophane business through legitimate business methods and by successful and energetic work, and that it did not obtain that position with any intent to exclude others, or through any predatory practices, and in that way I hope to show to the Court that the charges of the Government as to predatory practice, as to intent, as to control of supply, as to control of outlet, are false.

The Court. In short, what you are saying has direct relation to the competitive reports, for example, which the Government has put into evidence?

Mr. Gesell. Yes. I am reading from one now.

The Court. Well, Mr. Minicus says that he did not want to include all the material therein contained at the time he offered it. However, if what you are saying throws light on that portion which he has utilized—and I think it does—then I see no reason why you should be prohibited from making such comment as you want with respect to these particular writings.

Therefore, in order to get on, I shall rule that the objection of the Government is invalid and therefore overruled. Proceed.

Mr. Gesell. Now, the sixth one, your Honor, is entitled, "Increased Service to Manufacturers."

The Court. That is 6?

4976 Mr. Gesell. That is No. 6. We have price, quality, selling, moistureproof, automatic wrapping, and now increased service to manufacturers.

"Manufacturers more than ever are looking to Du Pont Cellophane Company salesmen for merchandising ideas.

"The recently installed Package Development Department is another step forward to increase our service to manufacturers."

We were telling the people who use cellophane what benefits they could get from it, what kind of a package they could put up, what cost they could save, how it would promote their merchandise, how it would improve the quality of their product, and in that way we sold more cellophane and did a public service, in my opinion, besides.

"7. Our Saturday Evening Post consumer advertising is creating a public acceptance for cellophane wrapped items and manufacturers are eager to have their product associated with a Du Pont product, both for prestige and advertising value.

And finally: "8. Quicker delivery has enabled us to regain business from firms who in the past have relied upon overnight delivery from our competitors." And it says that is particularly true in Chicago.

Well, there your Honor has normal, orthodox business conduct, and that is conceded by the Government. But you have something much more in our view of this case. You have the
4977 showing of exceptional efficiency, exceptional managerial
genius, and a courageous development of this product.

I ask your Honor to turn for a moment to 434. What did we say when Sylvania came into this business? Did we say, "We now have these fellows all tied up with price fixing arrangements and other curtailment programs"? Let me read the report on that, if you have any doubt as to Du Pont's attitude——

Mr. MINICUS. What page?

Mr. GESELL. Page 5724 of Exhibit 434.

"Sylvania Industrial Corporation.

"In the past, the old Birn & Wachenheim Co. followed the line of least resistance in their sales efforts. They have not attempted to develop new business or new industries by constructive suggestions in the way of package development, merchandising suggestions, and consumer advertising, but rather have waited until Du Pont developed an account and then attempted to secure the business by offering price concessions, quicker delivery, and extended credit terms. Whether Sylvania follows the same policy remains to be seen. If, however, they work along the same lines as Du Pont, i. e., development of new uses and new industries, it is felt that this type of competition will be beneficial to the industry as a whole."

Is there any indication in that of a policy of curtailment?

Now, let me go on with 434. You have at page 5681
4978 a running account of business lost and gained, in itself
showing competition, and it shows that business was shifting in this industry because of price competition, because of quality of stock, or because of discounts allowed by competitors, or the development of new units by the salesmen, or price reductions and service, or by work on wrapping machines. In other words, your Honor, each of these things which we were stressing, price, quality, machinery, service, were the very things that were determining where the business went. And if we did the best job—and we did in our view—and we did it efficiently, and we did it as the Government concedes by orthodox legal business means, how can we stand condemned under any law? And if others were excluded, to use the Government's pet phrase, because they were not as efficient and they were not as able, was that an exclusion by us when our intent is clearly in terms of developing our product, not of pushing somebody else out of the picture?

And what were the competitors doing? We have seen references before to the fact——

The COURT. Did you want to say something, Mr. Minicus?

Mr. MINICUS. May I suggest, your Honor, that the Government, although it has put in these competitive reports, has not brought up any of this matter of exclusion of competitors or anything else at this time. I simply point out to your Honor that we intend
to bring it up and I point out again the possibility that we
4979 are hearing it all now and we are probably going to have to
hear it all over again when the Government puts in its
evidence on that.

Mr. GESELL. Ever since I have come into court here I have been hearing that we are going to come to certain matters. Now we came to competitive reports yesterday. We discussed ten of them, and I think it is only fair that I be permitted to discuss them now.

Mr. MINICUS. I have no objection, your Honor, to Mr. Gesell discussing them now providing it will be understood we will not have to hear the same matter again when the Government puts in its evidence on these points.

The COURT. Well, I will try to bear up under it to hear it a second time. Proceed, Mr. Gesell.

Mr. GESELL. Thank you, your Honor.

What were the competitors doing? Were they adopting these policies that Du Pont was following? We see constant indication that they were not. In 431 the statement is made, "Our competitors have followed one very definite method of securing business——"

Mr. MINICUS. What page is that?

Mr. GESELL. 5686. (Continuing.) "Viz they waited until we had developed an account and then offered them a lower price for material 'just as good'."

Is there any indication there that the competitors are improv-
ing wrapping machines, improving quality, developing
4980 new uses, selling in a promotional way, working with
manufacturers?

Now, I would like to go on to Exhibit 432, which is the next one in this group, and you see a continuation of the same competitive activity in this market where we are supposed to have controlled outlet and controlled supply.

We got some candy business because they took on moistureproof cellophane. The competitor continued to have the regular cellophane. We got some business because we developed printing of cellophane. We got some baking business because the people found that the moistureproof cellophane kept the item that was being wrapped in better condition. And the same is true with some cookie business. And we got some busines from the macaroni company. Why? Because, as the report states, our assistance in developing new packages is responsible for the progress here. From Sherry's in New York we got some business. Du Pont service and collateral advertising won them over.

So again you see that the business was coming to us because we were performing these services most efficiently, and from time to time we were losing business where we missed our foot. If the cellophane broke, if it was defective, if it stuck, if it cracked, in came the competitor and he got the business. Well, isn't that precisely the kind of condition that is the antithesis of monopoly?

4981 Look at the summary. It says, "There is a tendency among manufacturers, particularly those in the meat, candy and baking industries, to adopt printed Cellophane in preference to the plain wrap. In addition to enhancing the beauty of the package, it permits the elimination of an insert label which has been the usual means of identifying a manufacturers product."

"At the present time our competitors are unable to get any of this business. There are no manufacturers printing or fabricating competitive material."

We were doing it, so we got the business.

Then what else does it say? "Without question Moistureproof Cellophane is also greatly responsible for Du Pont's relative gain." This was our product, invented by our own people, patented, and it was responsible for our gain.

"Du Pont Service in the way of merchandising suggestions, package development, and collateral advertising has been a contributing factor in regaining business from the competitors. Our competitors are not in a position to give this valuable aid to their accounts."

In the report on Exhibit 433, if your Honor please, there is more of the same. The important point there is made that not only did we regain business——

Mr. Minicus. What page, please? I regret the necessity of interruption but it is impossible to follow Mr. Gesell unless we know the paginations from which he is reading.

4982 Mr. Gesell. Page 5702, the statement is made, "The Du Pont sales volume for the third quarter of 1929 represents an increase of 42% over the previous quarter. It should be pointed out here that a very small percentage of this increase is due to business regained from competition."

We were off on our way, developing new uses and new outlets, your Honor.

Then there is more of the same proof as to gain and loss of business. Let me just refer to one, at page 5709 of the exhibit.

"Nutlax Corp.—this account is now wrapping their product by machine. This necessitates cellophane in roll form, which is not produced by our competitors at the present time."

We developed roll cellophane, an integrate complicated problem, your Honor, involving great work as to tolerances, as to sticking. We came out with the rolls and we got the business.

We heard a great deal about the cigarette business yesterday. Well, we got that cigarette business three years before Sylvania even got started in the business. We did a good job and we kept a good deal of it.

Mr. Minicus stated something that I found so extraordinary that I had to check the record twice about it. At page 1752 he said his complaint was that Du Pont had "more than its proportionate share of the cigarette business." Well, what is Du Pont's proportionate share of the cigarette business and who determines it? If we have 75 per cent of the total business and 85 of
4983 cigarettes, is that more than our proportion? Who says so?
And by what law? And have we reason to complain if in cigars, which was assiduously not referred to yesterday, it develops that Sylvania had more than "its proportion of the business" because they did a better job with sealing and other developments in cigars? This was a competitive business. There was no proportionate share of the business. And as these documents show, we were out building, working, fighting to get it by legitimate orthodox business means, and to talk about proportionate share is to lose the whole point of these documents just as it loses the whole point of these documents to say that they show status when they show such active competition.

4984 No. 433 in that summary at page 5712 again emphasizes the importance of moistureproof. The report states, "As has been mentioned in previous reports, moistureproof cellophane continues to be greatly responsible for duPont's relative position."

In 434 there is more of the same. There is reference, which I read to your Honor, to our attitude to Sylvania's coming into the business; and there are references on page 5723 to their hook-up with Sidac on an exclusive basis under a patents and process agreement for the North American continent, and in the earlier report the fact that the Belgian officials had to come over with Belgian-designed machines and install them to get Sylvania going in this business.

In 435, which is the next report—we are now into 1930—I want to read page 5728:

"The increased consumption of Du Pont Cellophane has been largely due to the acceptance of Moistureproof material, manufactured only by Du Pont, in the baking industry and particularly in the cigar industry where a virtual revolution of the merchandising methods has been occasioned.

"Other factors which have had an important bearing on the wider demand for transparent cellulose sheeting, are the lower prices and the rapid progress being made in the mechaniza-
4985 tion of wrapping methods, which have progressively opened up new markets, particularly in industries and for many purposes where former prices and hand wrapping methods prohibited its use. Aside from the direct advantage gained from automatic application, machine methods require the use of roll material and as this has not been supplied by Sylvania to date, it has been impossible for the competitor to participate in this type of business.

"The growing trend toward converted transparent cellulose sheeting has also served to restrict the activities of the competitor and has been a factor in gaining competitive business, since converted material has only been securable in Du Pont sheeting."

There again you see the result and effect and intent and purpose behind Du Pont's activities.

The COURT. Let us take a mid-morning recess of 10 minutes.

(At this point a brief recess was taken.)

Mr. GESELL. No. 436, your Honor, at page 5744, comes into the report of 1930 where Sylvania gets actively going in the business, and then we see the effect of its competition, Du Pont's attitude about it, and have further evidence of the existence of competition and the lack of Du Pont's control.

4986 On prices they report that Sylvania has offered quantity prices on orders for less than case lot quantities, and give free delivery, thus showing right from the beginning something you will find throughout these reports of intensive price competition through departures from list prices between Sylvania and Du Pont.

In 437, which is the report in the first half of 1931, the summary of the business conditions for that year, reference to the fact that Du Pont has had an increase, and at page 5748 that despite the prolonged depression it says that the reasons for that are as follows:

"Aggressive sales promotion by this company which has progressively increased sales to old line consuming industries and opened up new markets.

"2.—Willingness of manufacturers to seriously consider new means of increasing the sale of their products during times of stress—which fact has been capitalized upon by our sales organization:

"3.—Continuance of our policy of reducing prices when volume permits."

They refer to the fact that Sylvania is now making a moistureproof cellophane, and they say that "No doubt when Sylvania has perfected this sheeting they will attempt to compete with Du Pont in the volume industries requiring a moisture-retaining or repellant wrapper such as the tobacco, baked goods and candy industries."

4987 They talk about the fact that Sylvania is making very substantial quantities of sales especially in the baking industry as second grade material; in other words, selling second grade, as the later comments show, in order to meet Du Pont's competition.

Mr. Minicus. May I point out, your Honor, that none of these matters have any relevancy to any points that have been made at this time. It is true that these documents are in. I would like to point out particularly, your Honor, that the defendant's documents submitted to the plaintiff as a defense document makes a great point of the issue just raised by Mr. Gesell. In other words, once again we are having the defense dumped upon our case when there is no connection between the things that Mr. Gesell is relying upon now and any points that we have put into evidence so far.

Mr. Gesell. There is price competition in the market place, your Honor. I suggest that that has some bearing on whether or not Du Pont controls the supply and controls the output and controls the quality, which are the three issues I am discussing.

You will find further references at page 5751 of this report to quantity prices on split shipments and reports from the field indicating that Sylvania is selling first class material at second class prices, giving lenient credit policies and quicker deliveries, 4988 pointing up that as soon as they got into the business they aggressively competed for it.

Mr. Minicus. I would like to have the record show in addition—and this is in the form of an objection—that this material, particularly that last statement, was a deliberate hearsay statement of the rankest sort. Furthermore, every one of these statements are self-serving to the defendant.

Mr. Gesell. On page 5765 of Exhibit 438, the significant features of the industry for 1931 are summarized. Reference is made to the increased activity in transparent cellulose sheetings. Reference is also made to the substantial increases in the baked goods, confectionery and textile industries, and the adoption of the material by the cigarette companies, and increased use of the printing sheeting and fabricating articles, all of which again showing the expansion of this market.

On page 5759 of that report, 438, there is further indications of price competition and price concessions going over onto page 5760 by Sylvania.

"Price concessions in the form of free delivery and quantity prices on small shipments and lenient credit terms have also been important factors in our competitor's ability to increase volume."

It talks about Sylvania making connections with con-
4989 verters and developing means for prompt delivery, means of
reducing shipping charges.

No. 439, the discussion at the end of the report at page 5766 and 5767, shows the gain and loss of business as between Du Pont and Sylvania; shows that Sylvania got business in 104 accounts of medium and small size from Du Pont, showing the effect of their competition. It made gains in the shirt industry by recommending and selling second grade material, which is contrary to Du Pont's policy.

Then 440, which gets us up into the second half of 1932, there are discussions of changing conditions in the market. The first of many indications is there of our inability to know what Sylvania really is doing and the inaccuracy of our estimates. You recall we had that up yesterday, and on 5771, we think they made four million, four, when actually they made five million, eight, according to the statistics that have come out in the case.

There is a big discussion of our development of the cigarette business at page 5774, not all of which I can comment on, but there is enough of it there in the first section which I direct your Honor's attention to, and referring to Sylvania even at this late date Du Pont states that there is little evidence that they are doing a constructive type of selling with none-users of transparent sheeting. That is why they were not getting business.

There is further reference at page 5775 to the continua-
4990 tion of competition of a price character by offering mate-
rials at different grades and prices.

In 441, which brings us up to the 1933 period, references are made to the big expansion at page 5779, that Du Pont achieved by developing outlets in the bread business, because of its new heat-sealing cellophane which began the latter part of 1932. That is in the second full paragraph there and shows that we have already been able to get a million pounds of volume in the baking industry because of their development of the heat-sealing cellophane concerning which we will hear more as we get to the patent aspects of the case.

Mr. Minicus. There is no evidence here of who developed the heat-sealing cellophane.

Mr. Gesell. 441 at page 5780, you will see a discussion there of Sylvania's activities, unrestricted sales of second grade material and even third grade material at even 40 and 50% discount has also been responsible for their securing increased business in various industries that are there mentioned.

442, which covers the last half of 1933, continues these same themes again, the influence of heat-sealing cellophane upon the bread industry, and showing that now Du Pont has 2,000,000 pounds of that field, which appears at page 5783. There is
4991 also reference in 5784 that we were able to get some business back from Sylvania in the cigar industry, which shows the competition and pull and tug that has been taking place there.

Again at 5785, as elsewhere in these reports, it is shown how as Du Pont opened up a new field Sylvania came in and its sales benefitted by Du Pont's development work.

In 443, getting into 1934, you see the statement on page 5788 that increased tonnage enjoyed by Sylvania and our company in 1934 consisted mainly of moistureproof sheeting, which is a point that we have been stressing. Again the estimates there are way off by 2,000,000 pounds or more from the actual fact, showing we had no particular means of actually knowing what Sylvania's sales were, and all of our suppositions about their business proved, on the basis of the information that is now in the case, to have been inaccurate.

No. 76, which is the next of these reports, covers the year 1935. The competition situation is summarized and gains and losses of business are again shown as in the past. In each year you will notice an increasing number of uses and outlets for the product being developed and listed. A statement is made at page 238 that several of the more important cigar manufacturers as well as a number of smaller concerns transferred all or part of their requirements to the competitor because certain types of their wrapping machines were found to handle the competitive
4992 product more efficiently than was possible with cellophane.

In the report which follows, which is the annual report for 1935, Exhibit 77, we see more reference to the competition in the cigar business, with particular reference to the quality competition that was taking place. We see reference to strong selling efforts by Du Pont to recapture business in certain fields which were only partly successful. We see the formation by Sylvania of a purchasing syndicate of bakers to which it granted special discounts in order to carve out part of that business for itself. We see continuing references to price competition at page 259, and again a reference is made that the growth in the business is due to the promotion of new outlets and new opportunities, particularly this time in the candy business:

> Again our estimates are away off as to what they are doing.

4993 Exhibit 444 is the next of these reports for 1936, at page 5806. The reference under "Food Products" at page 5815 is one of many which I might mention where it states, "Development of additional new business by Du Pont was mainly responsible for our gain in position in the food industries."

In the converter business the reference is made to the fact that Du Pont printers benefited by Du Pont's promotion, particularly in the textile field in which competitive printers have not been particularly active.

Exhibit 78 covers the year 1937 and contains more of the same. There is talk there, which your Honor may want to note, of particular interest in connection with cellophane sales to the cigarette business showing strong competition and active solicitation of those accounts by Sylvania. Also the price competition which is being offered by Sylvania in the baked goods field by its special contract with a syndicate of bakers that it organized, 90 independent bakers who got special discount arrangements. Also quality competition in the field of candy.

1938 is in No. 79, which shows a continuation of the price competition through the supply of "seconds" in volume, and competition as to quality.

Also as to cigarettes, the gain and loss of business. I think we read that yesterday, at least the portions that are open for comment now.

4994 In textiles and hosiery in that year, for example, the report reads, "No competitive losses of importance were sustained in this classification. On the other hand, Sylvania was displaced in several of the southern hosiery mills through our ability to offer a non-sticking stock. Du Pont's net competitive gain is estimated at 20,000 pounds.

On the other hand, when we are over in food products, Sylvania is shown to have made a gain through the offer of a special deal on certain grades of sheet which gave a price advantage to macaroni and other food users.

In other industries we show an outstanding loss of 12,000 pounds again because Sylvania made a special price deal. That is at page 289.

In Exhibit 80, which is the next one, for 1939, the report is that Sylvania has been making consistent inroads into business developed by us over a period of time, especially during the past five years. It says, "During this period there has been a tremendous expansion of mechanized wrapping, of which we have been the principal beneficiary. This development, however, contributed heavily to our vulnerability in two directions.

"First, mechanized wrapping has required numerous modifications in the manufacture of transparent film. Where originally there was a problem of producing sheeting of maximum transparency and performance at the ultimate point of sale, mechanization of wrapping has added to problems of providing a

4995 material adapted to machine handling and maintaining a satisfactory return on rapidly growing volume."

It then discusses at some length, which I will not read, the competition with Sylvania in the development of quality business of that kind. One of Sylvania's converters is reported to have taken a substantial amount of business because of a price concession over on page 296.

In other lines it is reported that Sylvania displaced Du Pont on a price basis, giving further indication of price competition.

The remaining reports which come along after this get into the war period and deal increasingly with matters which are foreclosed for discussion or with the shortage problem which we have already discussed, and I don't intend to review those particular reports with the Court.

I hope as the case goes along the significance of these reports and what they show as to how Du Pont developed its business will not be lost sight of, and just as Mr. Minicus will have occasion to refer to them from time to time, I suppose I will.

There is one remaining subject, your Honor, which I should discuss to complete the comments on the documents which have been offered, and that relates to the converter business and the selective sales policy documents which we have already gone over.

4996 The Court. Could you give me an illustration, simply as background for my education, of a typical converter, how he operates, where he fits into the industry?

Mr. Gesell. Yes, your Honor.

I have to preface what I say by saying that there may not be such a thing as a typical converter because there are wide variations between the types of business that they do. But they buy cellophane, let's say, from Du Pont, and they convert it into other articles made in whole or in part from cellophane. They make envelopes, they make wraps for bread, they may make cigar tubes, they may make peanut bags, or they may make other items such as window boxes and window wrappers, where a portion of it is cellophane and a portion is paper, or they may make the so-called laminates which involves bringing cellophane into contact with some other material.

Essentially most of the people who started in the converting business were printers because of the operations performed by most converters is the printing of the cellophane. What happens is that they will buy cellophane from Du Pont and print on it either a decoration, or a wording description or labels, or both, or all of those, through rotogravure processes or through special dyeing processes, many of which were developed with the growth of this industry.

Then they will feed the cellophane after it has been printed—and it comes to them in a roll, your Honor,—it will
4997 run through machines that constantly print, print, print; they will run that through machines which make it into an envelope, make it into a wrapping material, make it into a window box, or a paper bag, or whatever it is. Then they ship that to the manufacturer who uses it to package his article.

Very few of these converters deal only in cellophane. And if I am not transgressing your Honor's ruling I would like to refer briefly to the fact that they do at the same time handle many other different wrapping materials which they put through the same processes of printing and making into different articles which are sold to these same classes of trade. They will have machines that are designed to handle the particular material, be it cellophane or something else, and often the different materials will run through the same machine, but essentially it is a printing and then a converting into a product process.

The COURT. There was some mention that Du Pont improved the machinery in connection with the use of cellophane. Is that the converter machines or the machines of the ultimate user, such as the baker or such?

Mr. GESELL. It is both, your Honor.

The COURT. In other words, they went into both fields and helped to develop——

Mr. GESELL. In point of fact, some converters' machines
4998 are identical, as I understand it, with machines that manufacturers have in their own plant. Some who are large users may choose to buy direct from Du Pont and make their own wraps. Their machine may be quite comparable to a machine which the converter has for making the wrap for the manufacturer. And Du Pont worked with both the converters and the ultimate users. The paper bag machine type of operation is one that would be similar to both.

They also worked, and here only with the converters, as I understand it, or primarily with the converters, on the printing, which is a highly expensive and complicated process and is done almost entirely by conversion. Large presses and many new techniques had to be developed by way of dies and the treatment of this cellophane which, as your Honor is aware, is somewhat delicate and often easily torn, to run at high speed through these machines.

The first essential step, your Honor, to either of these procedures, either selling direct to the manufacturer or to the converter, was the development of what is called roll cellophane, about which we heard so much in the documents. Until Du Pont could make a roll which it could send to the converter or the user to run through the machines, the development of this whole mechanized packaging outlet was not possible.

The development of roll cellophane, which the French never had, and for some time, as we have seen in these documents, Sylvania never had, is quite a complicated matter, as I under-
4999 stand the situation, because the cellophane must be a very, very even width throughout because it is, as your Honor is aware, very, very thin, and it has to be wound completely even and completely straight at the edges so as to be fed into these wrapping and packaging machines at high speeds in order that the users can wrap their articles at a low cost and efficiently, so much so that if some of these rolls are dropped on the ground they are no longer usable for the purpose.

So the first step was to develop the roll and the next step was to work with the users and the converters in the problems of printing and in the problems of making different kinds of wraps.

They are quite different than a middle man. Mr. Minieus referred to them as a middle man. They are not a middle man in the traditional sense at all because they perform these operations.

I think I should point out to complete it, your Honor, that in the development of these machines the evidence shows that Du Pont worked with the machinery manufacturers from whom the converters and sometimes the users acquired these machines.

The factors that led Du Pont to emphasize this broad type of development of course are foreclosed for comment now. But these steps with the converters were essential to any kind of mass marketing, essential to what I think your Honor referred to as taking cellophane from the carriage trade and putting it
5000 into commerce the way it is today.

In that very connection I wanted to deal with one or two of the documents on the converter aspect of the case which have been presented to the Court. I would like to ask the Court to refer to Exhibit 5046, at page 4555. The claim is made first by the Government that Du Pont grabbed all the giants of the business. I want to point out to your Honor that there weren't any giants of the business when cellophane started. There was nobody converting cellophane. It had never been done before. Some of the people who are large converters today had the courage and the conviction to go into this business with Du Pont at the pioneering stage, and as the product succeeded and the merchandising succeeded their business succeeded and of course they contributed to its success.

It is interesting to note on this exhibit that the first two converters that Du Pont had are now Sylvania converters. But Milprint, Shellmar and Dobeckmun, the three largest converters, were all pioneers at the time this business was started. I believe I referred in my opening to the fact that one of them ran a small bus line and one of them was a prizefighter. And they went into this business and grew up with it in duPont. And to picture that duPont went out and corralled some of these giants is to misrepresent the facts as they actually were.

There were many people who were printers at the time
5001 cellophane started, and there were many people who were
in the business of converting other materials. Some of them decided to take on cellophane as part of their line. I think in one case it was entirely as their line, and those people grew, but there was no corralling of the giants.

We heard a lot about how every time a converter developed its business to a satisfactory point duPont took the converter away. I simply want to call your Honor's attention to the fact that converters were taken way from duPont by Sylvania at the same time. I have no doubt that duPont succeeded in getting some converters that had been handling Sylvania's product, but this exhibit, 5046, shows equally that Sylvania took converters from duPont, not only duPont's first two converters, American Paper Goods and Herz, but Union Bag & Paper Company, Forbes Lithographing Company, Whiting-Patterson, and some substantial business from other promotional converters.

I would like your Honor to stop and think about this converting business in terms of the monopoly charge for a minute. The evidence shows that competition between converters is tremendously keen, not only between duPont and Sylvania's converters but between duPont converters, and here are a lot of people—you see them listed in Exhibit 5046—who are in business selling cellophane, sometimes for duPont, sometimes for Sylvania, and some-
times for both. The typical monopolist would not have de-
5002 veloped converters and worked with converters in promot-
ing business but would have integrated. There is not any integration here and there is strong competition, as the Government's evidence shows, between the various converters. And there are a lot of them in the business. The number is increasing steadily, as was pointed out not only from this exhibit but from other exhibits that carry it beyond the date of this exhibit.

* * * * * *

5028 The Court. Very well.

Mr. Renninger. If your Honor please, before calling the witness, I notice that one document, 5476, has been withdrawn by your order of last fall. With your permission, I would like to reproffer Government Exhibit 5476.

(Letter from O. W. Mielke to H. H. Replogle dated November 13, 1937, was received in evidence and marked "Government's Exhibit No. 5476.")

Mr. Renninger. At this time I would like to call as a witness Harry H. Replogle.

Harry H. Replogle, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Renninger:

Q. Please state your name and address.

A. Harry H. Replogle, R. F. D. 1, Mt. Kisko, New York.

Q. Are you a former employee of the Sylvania Industrial Corporation?

A. I was Vice President in charge of Sales from 1929 to 1945.

Q. Were you ever an official of the American Viscose Corporation?

5029 A. No.

Q. You left the employ of the Sylvania Industrial Corporation in 1945?

A. Prior to the merger with American Viscose.

Q. You have not been employed by the Sylvania Industrial Corporation since 1945?

A. No.

Q. As General Manager and Vice President in charge of Sales, what were your duties?

A. Exclusive supervision of sales.

Q. During the period that you were Vice President and General Manager, did the Sylvania Industrial Corporation have a West Coast distributor?

A. Yes.

Q. What was the name of that distributor?

A. Blake, Moffitt & Towne.

Your Honor, you will have to pardon my voice. I just got out of bed.

The Court. I understand, you have an ailment.

The Witness. May I suggest that you move over to this side, Mr. Gesell, if you care to.

By Mr. Renninger:

Q. Do you know the name of duPont's West Coast representative for the sale of cellophane?

5030 A. Well, when I was active it was Zellerbach Paper Company.

Q. During the course of your employment with Sylvania, did you ever have correspondence with Blake, Moffitt & Towne relative to the sale of cellophane?

A. Continuously.

Q. With whom did you usually correspond during that time, in Blake, Moffitt & Towne?

A. Mostly O. W. Mielke, General Manager.

Q. Who is Lew Connor?

A. Well, he was one of Mielke's assistants.

Q. In Blake, Moffitt & Towne?

A. In Blake, Moffitt & Towne in San Francisco.

Q. Do you remember corresponding with Mr. Mielke and Mr. Connor in November and December of 1937 relative to allowing Blake, Moffitt & Towne to issue its own price list and allowing Blake, Moffitt & Towne to include the freight charges to the Pacific Coast in these price lists?

A. There was some correspondence, but I don't remember the details.

Q. I hand you negative photostats from which Government Exhibits 5475, 5477, 268 and 269 are copies. Do these documents refresh your recollection (handing to witness)?

A. To a certain extent, yes.

Q. Do you remember writing the original of 5477?

5031 A. Except the notation at the top which is in my handwriting.

Q. On Government Exhibit 5477 the initials on the lower left-hand side "HRR: GT".

A. That is HHR: GT; they are my initials and also my secretary.

Q. You say that is your handwriting on the top of the document?

A. That is right.

Q. On the copy of Government Exhibit 269, whose handwriting is that at the top of the page?

A That is mine.

Q. Look at the copy of Government Exhibit 5476 which purports to be a letter from O. W. Mielke to H. H. Replogle dated November 13, 1937. Do you recognize the signature of Mr. O. W. Mielke?

A. I take that to be his signature, as I know it.

Q. Do you know the handwriting appearing on the left-hand side of that document?

A. That is mine.

Q. That is your handwriting?

A. Yes.

Q. Do you remember several representatives of the Department of Justice visiting the office of the Sylvania Industrial Corporation at various times in 1942 or 1946?

5032 A. I cannot tell you the dates but I remember their being there twice.

Q. Do you remember their obtaining various photostatic copies of various Sylvania documents?

A. We gave them free access to our files. I don't know what they took out.

Q. Were these documents that are designated as Government Exhibits 5476, 77, 268, and 269, some of the documents obtained by these men?

A. I would identify them as coming from our files.

5033 Q. After seeing and reading Government Exhibit 5477, do you believe that you wrote and signed the original of that letter, Mr. Replogle?

A. The second paragraph sounds distinctly like me.

Q. Do you believe that this document accurately represented your knowledge at the time it was written?

A. It must have or I would not have written it. My memory does not go back in details that far. It must have represented it.

Q. Looking at Government Exhibit 268, do you recognize the signature of Mr. Conner?

A. Well, I should say yes. I am not as familiar with his signature as I was with Mr. Meilke.

Q. I now call your attention to Government Exhibit No. 269, which is an unaddressed and unsigned letter dated December 13, 1937. I believe you stated that the H. H. Replogle at the top of the page in handwriting is your signature?

A. Yes, that at the top of the page is in my writing.

The COURT. Is the purpose of this witness' testimony in the main simply identification of documents?

Mr. RENNINGER. If your Honor please, it is to authenticate the documents and have the documents admitted as past recollection recorded since he testified he does not remember the circumstances surrounding the situation.

5034 The COURT. I just wanted to be certain that as I hear testimony unfold I wanted to know the purpose of it. It was not fully apparent to me. All I know is that the witness was identifying his signature and I could not get the significance of it. If that is your purpose, go ahead.

By Mr. RENNINGER:

Q. Does this document 269 appear to be your answer to Government Exhibit 268?

A. Give me a chance to read it a little bit.

I would say it is.

Q. And you believe this document accurately represented your knowledge at the time it was written?

A. At the time, yes.

Q. And it was a true statement of the facts as you knew them when you wrote that letter?

A. I always tried to avoid misrepresenting.

Q. Mr. Replogle, who is Dr. F. H. Reichel?

A. He was before the merger of the Sylvania Industrial Corporation with the American Viscose; he was president of the Sylvania Industrial Corporation, and since the merger has been president and chairman of the Board of the American Viscose Corporation.

Q. Do you remember writing an inter-office memorandum to Dr. Reichel on August 16, 1938, relative to the selling price for certain types of colored cellophane?

5035 A. No, I do not.

Q. I hand you a photostatic copy of Government Exhibit 271 and see if that will refresh your recollection.

A. Yes, these are my initials at the bottom of the memorandum.

Q. You don't remember writing the memorandum?

A. I don't remember having written it, but my initials are on it, so I wrote it.

Q. You feel that that is a true statement of the facts contained therein?

A. Yes.

Q. Is that a true photostatic copy of a document obtained from the files of the Sylvania Industrial Corporation?

A. Having my initials on it twice, I would say it is.

Q. Do you remember writing a letter to Mr. C. B. Stiner of the New York office of the Sylvania Industrial Corporation on September 27, 1940, which was entitled "Straight From the Shoulder," which is in the nature of a pep talk concerning the sale of Sylvania cellophane?

A. I don't recall. Let me see it.

Q. I hand you Government Exhibit 282.

A. There are no initials and no signature, but I have no doubt that I wrote it.

Q. The last page, Mr. Replogle, I notice the same H. H. Replogle: G and T.

5036 A. That is right.

Q. I presume the same applies, as you testified before, as to your secretary's initials?

A. That is right.

Q. Is that a true photostatic copy of the document obtained by members of the Department of Justice from the files of the Sylvania Industrial Corporation?

A. I believe it is. There are no identification marks of my own on that, but I believe it to be a true copy.

Q. Do you believe that this document accurately represents your knowledge at the time it was written?

A. I do.

Q. And was a true statement of the facts?

A. Right.

Q. Mr. Replogle, do you remember the change in cash discounts instituted on cellophane by Sylvania on November 1, 1941?

A. I remember the change in cash discounts, but I don't remember the date.

Q. Do you remember what the change was?

A. Elimination of cash discounts or parts of it. I don't remember whether we eliminated all of it or part of it.

Q. Do you remember various correspondence between yourself and Mr. Meilke of Blake, Moffitt & Towne relative to this change?

5037 A. There was considerable correspondence at the time and it did not relate to customers' cash discounts. It related to our agency discounts to Blake, Moffitt & Towne.

Q. I hand you Government Exhibits 5478, to 5489, inclusive. See if these documents refresh your recollection of the circumstances.

A. May I have time to look at them?

Q. Yes.

A. Without taking the time to read these in detail, they refresh my memory very much.

Q. Could you testify as to the circumstances surrounding this correspondence with Blake, Moffitt and Towne at this time?

A. To begin with, we were confronted with the conservation measure of either raising prices or taking other steps, and the first step consisted of reducing the weight or thickness of the sheet. The second step involved this cash discount thing you just mentioned.

Q. Do you remember what the cash discount was changed to?

A. I think we changed from 2% to 1%, and subsequently we allowed our agent, not customers, 2% as part of his compensation or commission.

Q. Do you remember the circumstances surrounding the allowance of the agent this 2% discount?

5038 A. I don't remember the details. There was considerable correspondence involved at the time.

Q. Do you remember sending the original of Government Exhibit 5478?

A. I do not. There is a follow-up notation on it in my writing.

Q. Do you believe that is a letter accurately——

A. I think so.

Q. Written by you?

A. Yes.

Q. Government Exhibit 5479, do you recognize the signature on the end of that letter?

A. Yes.

Q. That is the signature of Mr. M[illegible]ke?

A. That is right.

Q. Does that appear to be in reply to your letter of October 7, 1941?

A. Yes.

Q. Government Exhibit 5480, do you remember writing that letter?

A. I don't remember the letter, but my name is on it and shows I dictated it, but I didn't sign it. I undoubtedly wrote it because it pertains to this subject.

Q. You believe this document to be a true statement of the facts as you knew them when that letter was written?

A. I think so.

5039 Q. Referring now to photostatic copy of Government Exhibit 5481, the signature at the end is E. C. Persike?

A. That is right.

Q. Who is Mr. Persike?

A. He was our factory representative on the Coast, liaison man between Sylvania and Blake, Moffitt & Towne.

Q. Do you recognize his initials at the end of that letter?

A. I do.

Q. Government Exhibit 5482 is another document purported to be from Mr. Persike?

A. Those are his initials—or his nickname.

Q. Government Exhibit 5483, do you remember writing this letter, or do you believe that you wrote and sent this letter?

A. No, but the notation at the top is in my handwriting.

Q. At the top of the page?

A. Yes.

Q. Can you decipher the note right above the name of O. W. Mielke there on the first page?

A. "JWI, note and return to Miss Tyner for follow-up." She was my secretary.

Q. That is in your handwriting?

A. Yes.

Q. And you believe that this document was a true statement of facts as you knew them when the letter was written?

5040 A. I would not have written it otherwise.

Q. Turn to the photostatic copy of Government Exhibit 5484, which purports to be a letter from E. C. Persike to yourself.

A. I have not read it, don't know what it says, but it is Ed Persike's signature.

Q. And it was sent to you in the regular course of business?

A. In the course of our business reports.

Q. Government Exhibit 5485, do you remember writing this letter?

A. The notations at the top of that are my writing.

Q. And you believe that is a photostatic copy of a document obtained from the files of Sylvania Industrial Corporation?

A. Undoubtedly it is.

Q. Now, Mr. Replogle, I call your attention to photostatic copy of Government Exhibit No. 5486, which is without the name of the addressee or addressor. Can you identify that document?

A. I cannot, as I told you before. I had identified the writing as Mr. Little's, but I believe Mr. Little disputed it.

Q. Do you believe this document to be taken from the files of the Sylvania Industrial Corporation?

A. Well, it is so marked, so I believe it came from there.

Q. Government Exhibit 5487, do you believe this as a
5041 letter written by yourself to Mr. Mielke?

A. The follow-up notations are in my handwriting.

Q. Government Exhibit 5488 is a document from Mr. O. W. Mielke and addressed to "My Dear Harry," dated November 10, 1941. Do you recognnize the signature of Mr. Mielke on that letter?

A. I do. That is Mr. Mielke's signature.

Q. Does that appear to be in answer to your letter of November 6?

A. I have not read it yet. [Witness reads.] I think it is.

Q. I hand you Government Exhibit 5489, which purports to be an inter-office communication from yourself to Mr. Persike. After seeing and reading this exhibit, do you believe that you wrote and sent the original of this inter-office memorandum?

A. I do.

Q. Mr. Replogle, I hand you photostatic copies of Government Exhibits 274, 294 and 225, which are all various sales bulletins from Sylvania Industrial Corporation.

Mr. **Gesell.** Is that first one 274?

Mr. **Kenninger.** No, I beg your pardon. It should be 276, 294, and 225.

Mr. **Gesell.** Thank you.

By Mr. **Renninger:**

Q. Can you identify these documents?

5042 A. For signature or contents?

Q. For signature where they have signatures or being copies.

A. 276 is my signature, my initials. 225 has also my signature, or initials.

Q. And 294?

A. Let me read it because it has nothing on it.

Q. Is that a document taken from the files of the Sylvania Industrial Corporation?

A. Judging from the subject matter I would say it came from our files, but I don't recall dictating it. I don't think I did. I think maybe somebody else dictated it.

Q. But it is a letter of the Sylvania Industrial Corporation?

A. Yes.

Q. As to all these documents that I have handed you, Mr. Replogle, you feel that they are all true photostatic copies of documents from the files of the Sylvania Industrial Corporation?

A. I believe they are.

Q. And as to all those documents which I have shown you that you have written yourself, you believe that the document accurately represented your knowledge at the time it was written?

5043 A. As I stated previously, I would not have written it if I did not believe so.

Mr. Renninger. If your Honor please, I would like to offer these documents into evidence.

Mr. Gesell. We have an objection to each of them, your Honor, on different grounds, and if it meets the convenience of the Court I think we had better take them up one at a time so I can state my objections as to each one separately.

The Court. Do you want to examine the witness?

Mr. Gesell. I see no need of it on the basis of the examination. But if the documents are admitted in evidence we will wish to examine him with respect to their contents. I don't think any foundation has been laid by this testimony for the admissibility of the documents.

Mr. Minicus. May I call for a side bar conference with counsel at this time?

The Court. Surely.

(There was a side bar conference.)

Mr. Gesell. Your Honor, as to Exhibit 5476, which is the first of this group, it is a document dated November 13, 1937, addressed to Mr. Replogle by Mr. Mielke. There has been no showing that Mr. Replogle has any knowledge of the truth or falsity of facts contained in Mr. Mielke's letter. The letter is clearly hearsay as to duPont. There is no showing that the document was brought to duPont's attention, written with duPont's authority.
5044 It is a document in fact between Mr. Mielke, a distributor for Sylvania, and Mr. Replogle of Sylvania. It is entirely hearsay and irrelevant as far as duPont is concerned.

The Court. Shall we take them up seriatim?

Mr. Gesell. Yes.

The Court. Mr. Renninger, what is the proffer of proof of the matters contained in this letter?

5045 Mr. Renninger. If your Honor please, this is one of a group of letters—admittedly it is a letter written from Mr. Meilke to Mr. Replogle, but we feel that it is admissible on one of various grounds.

The Court. What is the purpose as against the defendant in this courtroom, duPont? What has duPont got to do with the subject matter of this letter?

Mr. Renninger. Not of that particular letter, if your Honor please, but the letters following, the letters——

The Court. Assuming I would allow all the letters in, what is your proffer of proof with respect to all of them as against this defendant duPont?

Mr. Renninger. The proffer of proof is that in the fixing of the prices on the West Coast for the distributors—that is, the Sylvania distributor Blake, Moffitt & Towne, and the duPont distributor Zellerbach, that Sylvania consulted duPont as to the advisability and issuance of a special price list for the West Coast.

Mr. Gesell. These documents do not concern that subject, your Honor.

The Court. I see nothing, for example, in the exhibit which would even intimate such a suggestion.

Mr. Gesell. And even if Mr. Meilke did say so, I don't think the fact that he wrote Mr. Replogle can bring the statement in against us.

5046 Mr. Renninger. The next two letters, your Honor, I think will more clearly bring that out.

Mr. Gesell. I am directing my attention first to No. 5476.

The Court. I am putting that to one side. Go to the next one.

Mr. Gesell. The next one is a letter which Mr. Replogle states he wrote to Mr. Meilke. There is nothing to show that he wrote that with duPont's knowledge or with duPont's authority, and I say it also is irrelevant and hearsay as to duPont.

The Court. 5477?

Mr. Gesell. That is 5477, yes. These are, in effect, internal documents within the Sylvania organization.

The Court. The next exhibit, Government Exhibit 5477, does not mention duPont?

Mr. Gesell. No, your Honor.

The Court. Let us take up the next one.

Mr. Gesell. No. 268 comes in the category of the first one. It is a letter by Mr. Conner, whose signature he thinks is correct, but that again is hearsay, as I see it, your Honor. It falls in the category of No. 5476.

The Court. Is there anything in that letter which connects this defendant with the subject matter therein cited?

Mr. Gesell. I see nothing, your Honor.

5047 Mr. RENNINGER. The Government contends that it does.

The COURT. Where?

Mr. RENNINGER. This is 5477, you mean, sir?

The COURT. 268.

Mr. RENNINGER. If your Honor please, in 5477, in that letter from Mr. Replogle to Mr. Meilke he talks of "We were able to convince the customers to whom I talked that the logical procedure is to print a special price list for the Pacific Coast and they have agreed that this should be done."

The COURT. My statement is still correct. There is nothing in that letter about duPont so far. We are putting it aside and see if we can connect it up later. The only way to do it is to go over them one by one.

We are now taking up 268. Where is duPont or the defendant in this case mentioned in this one?

Mr. RENNINGER. The only place is in the word "customer."

The COURT. The same observation.

The next one, 269.

Mr. GESELL. 269 is in the category of 5477, Mr. Replogle's letter to his distributor. I see no reference there to duPont. There is a discussion of Mr. Meilke's competitors.

The COURT. I make the same observation.

5048 The next one on my list is 271.

Mr. GESELL. If I may pause a moment, these four are one group, your Honor.

The COURT. There is nothing after this?

Mr. GESELL. No. This is one chain.

Mr. RENNINGER. This is one group.

The COURT. Well, I can't add anything to what I have said. There is no reference to the duPont Company, the defendant, in any of these documents:

Mr. RENNINGER. If your Honor please, it is our contention by a reading of these documents it is perfectly obvious that the word "competitor" there, duPont is meant. If your Honor please, we feel that these documents are admissible as past recollections recorded. To show that a document is admissible as past recollection recorded we have to show that the witness has no present recollection of the transaction or document, that the witness must affirm that he knew it to be true at the time of the making of the document, and the document must be properly identified and recorded at or about the time of the event.

The COURT. Assuming all that is so, how does that affect this defendant duPont?

Mr. RENNINGER. If your Honor please, although it is——

The COURT. What does it show duPont did or failed

5049 to do either legally or illegally?

Mr. RENNINGER. It indicates that Mr. Replogle talked to some of the officials in the duPont organization relative to setting up a special price list for the Pacific Coast area. duPont would have a price list for their distributor out there, allowing for the freight rates, and that Sylvania would have a price list on the West Coast similar.

The COURT. Is this the best evidence you can get on that point?

Mr. RENNINGER. On this one particular point, yes, sir.

The COURT. Put that group aside. Take up the next group.

Mr. GESELL. The next one is 271. I raise no objection to that.

The COURT. Let it be admitted. 271 is admitted.

(The memorandum from H. H. Replogle to Dr. F. H. Reichel, dated August 16, 1938 was received in evidence and marked "Government's Exhibit No. 271.")

The COURT. Next one.

Mr. GESELL. 282 is a sales letter written by Mr. Replogle to Mr. Stiner called "Straight From the Shoulder." There is nothing to tie duPont to that document at all that duPont knew of it,
duPont authorized it, duPont ever received it, or that it was
5050 written with duPont's permission, consent, acquiescence, or
anything else. It is a sales letter of Viscose. I know that Mr. Replogle meant what he said when he said it. He would not have said it if he didn't think it was true. But a sales letter has all kinds of statements in it and certainly cannot be brought home to us. I assume the Government is relying on the statement at the back which is in 282 at the top of the first full paragraph, where there is a reference to prices, but that statement is not a statement which was ever brought to duPont's attention or binding on duPont in any way.

Mr. RENNINGER. There is another statement, if your Honor please, on page 744 in the middle of the page: "Our prices and terms are definitely fixed and you have never been confronted with price competition."

Mr. GESELL. That is the one I refer your Honor to. I assume that is what they talk about, but that is not a statement that can be brought home to duPont because this gentleman undertook to say whatever it means to his salesmen. It is hearsay as to duPont.

The COURT. That goes in category 2.

Next one.

Mr. GESELL. What is category 2, your Honor?

The COURT. Well, it started off with 282.

Mr. GESELL. Oh, yes, I understand. Thank you.
The next is a long chain of correspondence that goes,
5051 I believe, down from 5478 through 5489.
Is that correct?

Mr. RENNINGER. Yes.

Mr. Gesell. That is a long series of communications between Mr. Meilke and Mr. Replogle, and I think my comments as to those, your Honor, are the same as my comments as to the first two documents. They either fall in one category or the other. An additional fact is that some of them were written apparently by a salesman named Ed to Mr. Replogle, but he also is not shown to be acting with duPont's knowledge or approval, and none of these are shown to be communicated to us. I think they are both hearsay and irrelevant. He obviously has no recollection of the truth of the facts in other people's letters, because he never knew whether they were true or not.

The Court. That leaves——

Mr. Gesell. That leaves three, your Honor, which are in the nature of sales bulletins—294, 225 and 276. Those are all sales bulletins, not referring to duPont, sent out by Sylvania to its own customers or salesmen.

The Court. What is the purpose of that last group, Mr. Renninger?

Mr. Renninger. It was principally to show the change in the discount, a change in yield, I believe, your Honor.

I would like to say something relative to all the
5052 documents as a whole.

The Court. Yes.

Mr. Renninger. We feel, of course, that the documents written by Mr. Replogle himself, which he has testified to, are definitely admissible as past recollection recorded. As to the rest of the documents, we feel they could be admissible on various exceptions to the hearsay rule. Although it is admitted that Sylvania is not named as a co-conspirator in this action, the complaint at paragraph 35 states "From time to time duPont has had understandings with Sylvania and Ceylon regarding prices and discounts on cellophane and caps and bands, respectively."

Although in various of the cases the facts are not always clear that declarations of a co-conspirator are admissible, although the co-conspirator is not joined as a defendant or is unnamed——

The Court. That rule is subject to the qualification that the corpus delicti must first be proved before the admission of any co-conspirator can be put into evidence, and this is the first time I have heard of any corpus delicti, to wit, any conspiracy.

Mr. Gesell. Your Honor, if I may remind the Court, we have affirmative evidence negativing any price understanding through the cross-examination of Mr. Hamburg, who preceded this
5053 man, who testified categorically to the absence of any discussion, talks, or arrangements or any kind affecting price; so we already have it clear there isn't any such conspiracy.

Mr. Renninger. If your Honor please, in an antitrust case it is permissible to prove the conspiracy after and to let the——

The Court. After what?

Mr. Renninger. To prove the conspiracy at a later time, leaving the particular evidence in at the present time until the conspiracy is proven.

Mr. Gesell. It has been disproved, your Honor, already.

Mr. Renninger. Of course, we contend that it has not, and we contend that we will prove there was a conspiracy. We feel, too, your Honor, that the witness is here who can testify, and documents by third parties, whether or not they are parties to the action, are admissible to show their motive, their purpose, or their state of mind.

Mr. Gesell. The fact that Mr. Replogle has a present recollection revived by these documents does not get over the fact that what he recalls is still irrelevant and hearsay, your Honor. He could not testify to this, in my judgment, if he did recall it.

Mr. Renninger. It is not a present revived recollection, 5054 it is a past recollection recorded, in which there is a great distinction.

Mr. Gesell. It is without difference when it comes to the question of relevance.

Mr. Renninger. If your Honor please, I would like to call your attention to Wigmore, Section 2120, relative to admitting into evidence a complete series of letters to a correspondence.

The Court. I am going to sustain the objection to No. 5476, 5477, 268, and 269; also the pep talk letter No. 282.

(At this point Exhibit 5476, which had been previously admitted, was withdrawn from evidence.)

The Court. I am allowing all other exhibits in. Their weight can be discussed in argument or briefs. If counsel thinks they contain sufficient steam and they want to argue the legality of the thing at length, you can move to strike these exhibits.

Mr. Gesell. Thank you.

(The letter from H. H. Replogle to Mr. O. W. Mielke, dated October 7, 1941, was received in evidence and marked "Government's Exhibit No. 5478.")

(The letter from Mr. Mielke, of Blake, Moffitt & Towne to Mr. H. H. Replogle, dated October 9, 1941, was received in evidence and marked "Government's Exhibit No. 5479.")

5055 (The letter from Mr. H. H. Replogle to Mr. Meilke, dated October 17, 1941, was received in evidence and marked "Government's Exhibit No. 5480.")

(The letter from Mr. E. C. Persike to Mr. H. H. Replogle dated October 27, 1941, was received in evidence and marked "Government's Exhibit No. 5481.")

(The letter from Mr. E. C. Persike to Mr. Replogle dated October 28, 1941, was received in evidence and marked "Government's Exhibit No. 5482.")

(The letter from Mr. H. H. Replogle to Mr. O. W. Meilke, dated October 30, 1941, was received in evidence and marked "Government's Exhibit No. 5483.")

(The letter from Mr. E. C. Persike to Mr. Replogle dated November 1, 1941, was received in evidence and marked "Government's Exhibit No. 5484.")

(The letter from H. H. Replogle to Mr. O. W. Meilke, dated November 4, 1941, was received in evidence and marked "Government's Exhibit No. 5485.")

(An undated memorandum was received in evidence and marked "Government's Exhibit No. 5486.")

(The letter from Mr. H. H. Replogle to Mr. O. W. Meilke dated November 6, 1941, was received in evidence and marked "Government's Exhibit No. 5487.")

(The letter from Mr. O. W. Meilke to "My dear Harry", dated November 10, 1941, was received in evidence and marked
5056 Government's Exhibit No. 5488.")

(The memorandum to Mr. E. C. Persike from H. H. Replogle, dated November 13, 1941, was received in evidence and marked "Government's Exhibit No. 5489.")

(The letter from Sylvania Industrial Corporation to "Our Customers," dated November 1, 1941, was received in evidence and marked "Government's Exhibit No. 294.")

(The letter from H. H. Replogle to "Entire Sylvania Sales Division," dated November 7, 1941, was received in evidence and marked "Government's Exhibit No. 225.")

(The letter from H. H. Replogle to "All Branches Salesmen and Agencies," dated October 30, 1939, was received in evidence and marked "Government's Exhibit No. 276.")

Mr. Gesell. Mr. McGlothlin will examine Mr. Replogle. I don't think the examination will take very long and I am sure Mr. Replogle wants to get away today.

5057 Cross-examination by Mr. McGlothlin:

Q. Mr. Replogle, in Government Exhibit 271, which appears to be a memorandum from you to Dr. Reichel—do you have that before you?

A. I don't appear to have 271.

Q. You make this statement, Mr. Replogle, and I quote from the document——

A. I haven't got it. You have it somewhere. I haven't got 271.

Q. "There seems to be no established prices for these items." What do you mean by "no established prices"?

A. No printed list prices.

Q. You say, "We have been officially advised by our competitor * * *" What do you mean by "officially advised"?

A. Because I probably called up John Hatt and asked him if they had the prices for those sizes.

Q. Did you have any agreement with duPont that did establish prices?

A. No, sir.

Mr. Minicus. I object to that.

The Court. Has the question been answered?

Mr. Minicus. I am sorry; I will withdraw the objection.

5058 The Court. You objected, and do you withdraw the objection?

Mr. Minicus. I will withdraw the objection.

The Court. All right. I didn't get the answer.

The Witness. The answer was, no, sir.

By Mr. McGlothlin:

Q. Do you have any system of official advice between duPont and Sylvania as to prices?

A. None whatever.

Q. Returning to 5478, Mr. Replogle—do you have that exhibit there?

A. Yes.

Q. You state here in a letter to Mr. Mielke that you are starting at once to reduce the gauge or thickness and correspondingly increasing the yield or area per pound of cellophane. Why was that done, Mr. Replogle?

A. To meet the cost conditions, and as I related before, to avoid the raising prices.

Q. Had there been any Government suggestions as to the reduction of gauge?

A. It had emanated with the Government.

Q. Had there been any agreement with duPont as to the reduction of gauge?

A. No, not to my knowledge.

Q. Was there ever such an agreement?

5059 A. No, not to my knowledge. I think, however, that they reduced their gauge before we got around to reducing ours.

Q. Referring to Government Exhibit 5486, is that your handwriting at the top of the page——

A. It is not.

Q. Where it says "approximately two per cent higher"?

A. No, it is not.

Q. Is the other note up there, "their standard discount" your handwriting?

A. No, it is not.

Q. Did you dictate this note?

A. I don't recall it.

Q. When do you recall first seeing it?

A. When either your side or the Government side showed me these photostats.

Q. I show you Government Exhibit 5487 which recites, "I have authority of reason to believe * * *"

A. That probably should read, "I have authority or reason to believe * * *"

Q. What was the basis for that authority or reason?

A. It might have been talking to customers from the Pacific Coast; it may have been talking to somebody in Zellerbach's organization.

Mr. McGlothlin. No further questions, your Honor.

The Court. May the witness be excused?

5060 Mr. Minicus. I have just one question or two, your Honor.

Redirect examination by Mr. Minicus:

Q. With reference to Government Exhibit 271, the first exhibit that Mr. McGlothlin cross-examined you on, Mr. Replogle, you said you had no agreement to fix prices with duPont. You mean that no officials of the duPont Company and of the Sylvania Company sat down and talked over the fixing of prices?

A. No, they did not.

Q. You do say that in connection with that letter you called Mr. John Hatt?

A. I probably called Mr. Hatt, because he was the only one I would ever ask any questions, and I had no hesitancy of asking him any information like if he asked me for any, he got it, but there was no connivance.

Q. You did call Mr. Hatt on more than one occasion, Mr. Replogle?

A. If I wanted information. I don't recall any particular occasion, but that is probably where I got this.

Q. Now, you said that that change in gauge was the result of Government instigation?

A. If I remember it correctly, it was Government instigation of cutting down and conserving materials.

Q. Was there any specified order under which that was done?

5061 A. I couldn't tell you.

Q. Just one more question. Do you recall any correspondence or conversations with anyone in the duPont Company relative to the change in gauge?

A. No, because that change in gauge came through our Technical Department. I had nothing to do with it.

Mr. Minicus. Thank you very much.

The Court. You are excused, sir.

The Court. I think we will adjourn for this evening. Adjourn Court until tomorrow morning at 10:30.

(At this point the trial was adjourned to Friday, April 13, 1951, at 10:30 o'clock a. m.)

* * * * *

5084 *Offers in evidence*

(Price List of January 15, 1934, was received in evidence and marked as part of "Government's Exhibit No. 398.")

Mr. Renninger. It is the Government's contention that price competition has been virtually non-existent in this industry. From 1924 until 1930 by virtue of its absolute monopoly, duPont's price was the only price for domestic cellophane. We have seen that imported cellophane has never been an important factor in the cellophane market in the United States. And I refer to Government Exhibits 182 and 182–A, which are already in evidence.

From 1930 to 1941, as will be seen from these price lists, duPont and Sylvania exacted identical prices, terms and conditions of sale for all classifications of cellophane and all grades of cellophane sold by them in common.

It will be noted that the effective date of all these price lists was exactly identical, although, as Mr. Hamburg has testified, in certain instances the Sylvania price list may have been printed a day or two later.

Mr. Gesell. In all instances. Your Honor, if we are going to compare these price lists, ought that not be done in some way other than this general characterization of the list? We don't agree with Mr. Renninger's statement as to how they match up.
5085 And I think we ought to wait until there is some way of bringing that before the Court in a manner so that these various lists can be checked from that point of view. At least I will enter my reservation on the record, if I may, with respect to that.

The Court. I think your suggestion has merit insofar as I am concerned. If someone would stand there with both lists and each side made their commentaries, by the use of the blackboard or such, it would be helpful to me.

Mr. Minicus. I think Mr. Renninger prefaced his statement by saying "we shall show," or something like that, to indicate which direction we were going in.

Mr. Renninger. I was just going to follow up by stating that we would like to mark for identification purposes only Government Exhibit No. 549, leaving for a later time the full discussion of the price comparison contained therein. Your Honor will note that this price comparison, which is a comparison of specified printed cellophane prices and the price lists of duPont and Sylvania in effect from February 1, 1930, to December 31, 1946, did not contain a covering page. For your Honor's assistance in understanding what the price comparison contains, we have prepared a covering page.

Mr. Gesell. Your Honor, this does not contain a comparison of all the prices by any means. This is a highly selected group, limited as to years, limited as to types, and I think since it is
5086 just for identification it would be better to have some kind of testimony concerning it.

The Court. As to how it was made up?

Mr. Gesell. Most of it concerns about 9 or 10 per cent of the business, and large areas of price comparison are not made in the schedule at all.

Mr. Minicus. We are only asking that it be marked for identification.

The Court. All right. I have nothing before me.

* * * * *

5102 The Government introduces into evidence Government Exhibit No. 461, pages 5917–5934, inclusive. This is a report from L. A. Yerkes, President, to the Board of Directors of the Du Pont Cellophane Company, dated January 13, 1926.

(Report from L. A. Yerkes to Board of Directors, Du Pont Cellophane Company, Inc., dated January 13, 1926, was received in evidence and marked "Government's Exhibit No. 461.")

Mr. Renninger. I will read three paragraphs in the middle of the first page:

"Following the discussion at the last Board Meeting, we are putting in effect as of January 15th a new schedule of prices. The new price lists have not yet been received from the printer, but the changes in prices affect principally #300 Cellophane, which has been reduced from 8¢ per thousand square inches for stock size sheets in case lots to 7½¢. The cut-to-size price on #300 has been reduced from 9¢ to 8½¢. The differential between #450 stock size and cut-to-size was not entirely consistent
5103 in the old schedule, so in the new we have retained the #450 in stock size sheets, case lots, at 10¢, but have reduced the price on the cut-to-size sheets from 12¢ to 11½¢.

"The differentials for quantities less than one case are the same in the new schedule of prices as in the old. In addition to the above, special quantity discounts will be given of 2½¢ on five case lots purchased at one time and 5% on ten case lots purchased at one time.

"In order to be able to meet any bulge in the business that may come from these price reductions, we are planning to maintain at least a full month's stock of Cellophane and will increase this as we near the months in which we have heretofore had our peaks."

The Government introduces into evidence Government Exhibit No. 347, which is a report from the Cellophane Department, signed by J. E. Hatt, General Manager, to the Executive Committee, dated December 31, 1929. It is entitled "Price Study."

(Report from J. E. Hatt, General Manager, Cellophane Department, to the Executive Committee, Du Pont Cellophane Company, Inc., dated December 31, 1929, was received in evidence and marked "Government's Exhibit No. 347.")

Mr. Renninger. It reads:

"There is submitted herewith, charts showing the detail of the study of the Cellophane price situation, submitted for your information and comment as to the continuation of our 5104 present policy on prices, which has been to continuously reduce prices as the volume and market conditions seem to warrant such action.

"Anticipating that it will probably be desirable early in 1930 to consider a further revision downward of the price level, there is submitted herewith, for your consideration three schedules showing various revisions of the present prices, with the thought that the Committee may want to express its feeling as to the amount of the decline, after having informed themselves as to the effect of such proposed decline, on the net return and the possible volume.

"We should like to point out that inasmuch as Cellophane is sold largely by an area of 1,000 square inches, in both cut-to-size and stock size sheets, it is desirable to confine the price revision, if possible, to fractions not smaller than ¼¢ per unit because it seems inadvisable to have prices terminating in a fraction any smaller than ¼¢ as quoted to a prospective customer. This makes the spread in percentage of decline of considerable scope at times, considering varying of these schedules as submitted herewith."

I will not read the rest of that page. The second page contains various charts and schedules. Schedule I describes what would probably be the result if a price decline of ¼¢ on Regular stock size sheets were made and ½¢ on Regular cut size. Schedule II shows various other changes. I would like to read 5105 page 3, which is Schedule III:

"Schedule III represents a study showing proposed decline on Regular the same as on Schedule II, and with the Moistureproof decline increased to ¾c per unit on cut size and stock size and 15c per pound on Moistureproof rolls. This represents a proposed decline of 12.10% on the case lot price, or slightly less than this on the average price received, and is submitted as the maximum decline considered desirable or necessary at the present time.

"Chart 'B' attached, shows the year to date net per pound before the decline of August 1st, last. It shows also, the net return per pound for the 11 months to the end of November, and the net return per pound for the 4 months' period alone since the August 1st decline."

Skipping then to the third paragraph from the bottom:

"There is attached to this chart also, tabulation showing the total tonnage of new business which such declines will have to produce to yield the same net return in 1930 at these lower levels as was returned in 1929. These figures likewise are based on the same proportion of volume between different kinds and grades as existed in 1929, and as Moistureproof is now running a larger percentage than for the year to date 1929, the proportion will be somewhat changed, and on account of the higher return of the increased proportion of Moistureproof, there will probably
5106 be required a materially less volume of new business to bring about a return equal to the 1929 results.

"In this connection, it should be pointed out that the net return for the year to date in 1929 will undoubtedly exceed 45% of the gross receipts. This figure, to be compared with a net of 42.4% in 1928 and 38.8% in 1927, of the gross receipts.

"Also, attention is called to the fact that the net return in 1928 was 51.3¢ per pound on all sales. In 1929, it will be in excess of 48c per pound, notwithstanding the November 30, 1928 price cut and the August 1, 1929 price cut—the former of which exercised practically no effect on the return in 1928 but amounted to a full reduction in price on all the 1929 volume.

"Chart 'C' is also attached showing the effect of price declines on sales volume against similar periods of other years. Prior to 1927, prices were set in the first month of the year, without change thruout the year, so that the first mid-year price change came in August of 1927, and the declines since are discussed in Chart 'C'."

I will skip the next two paragraphs and read the last two paragraphs.

Mr. GESELL. The next two are what the whole thing is about.

Mr. RENNINGER. I don't see very well how I can separate some of the material contained in the next paragraph,—

5107 Mr. GESELL. The next paragraph gives the reasons for the price change.

The COURT. We will take the mid-morning recess.

(At this point a short recess was taken.)

5108 Mr. RENNINGER. If your Honor please, the next two paragraphs of Government Exhibit No. 347 are two paragraphs which the Government wished to read in the very beginning, but in deference to your Honor's ruling we decided not to read them. In view of Mr. Gesell's insistence I will read those paragraphs.

The COURT. Which ruling are you referring to?

Mr. RENNINGER. The ruling relative to substitute material.

Mr. GESELL. I don't think these paragraphs are precluded by your Honor's ruling.

The COURT. I see.

Mr. GESELL. I hope I am correct in that.

The COURT. Proceed.

Mr. RENNINGER. (Reading.) "The reasons for consideration of proposed price revision at this time are largely the attempt to open up new and large markets on possible units of lower priced commodities and also, the present and prospective competitive situation, not only as regards other manufacturers of a material similar to cellophane"—I may add parenthetically here they are evidently speaking of Sylvania.

Mr. GESELL. Not at all.

5109 Mr. RENNINGER. But also including the recent improvements in Glassine. The details covering these two situations are perhaps, too extensive to attempt to discuss here but I believe are thoroughly understood by the Executive Committee members and should have full consideration.

"With the introduction of our next price revision, we propose to revise our agreement contract now offered to buyers of large quantities of Cellophane, to increase the total volume of purchase necessary to secure the present percentages of rebate and also, to reduce the top figure of the present rebate agreement to 5%.

"It will, perhaps, be desirable to advise the Committee further in person regarding this and if the Committee so desires, this will be done.

"There is also the Moistureproof situation and its effect on our future activities and in the consideration of this by the Committee, we should like an opportunity to explain further, in person, our ideas regarding this for their comment.

"From this, we hope to have from the Committee a rather definite expression as to the amount and extent of price revision as it develops. There has been some feeling in the past, apparently, that further changes might have been made than have been accomplished and this feature, we should like an opportunity to discuss in person with the Committee."

The Government offers in evidence Government Exhibit No. 346, page 865. This is a letter from Mr. L. A. Yerkes 5110 to Mr. W. S. Carpenter, vice-president of duPont, dated January 4, 1930.

(The letter from L. A. Yerkes to W. S. Carpenter, dated January 4, 1930, was received in evidence and marked "Government's Exhibit No. 346.")

Mr. Renninger (Reading.) "We have come to the conclusion that it would be advisable to make a further reduction in our Cellophane price list, and an over-all reduction which will amount to between 11% and 12% (suggested Schedule #3 on the enclosed report from Hatt) is the one we have in mind.

"I think you will be interested in reading this report and I don't know that I can add very much to it, except that fundamentally we believe the policy involved is the correct one. We are still making a percentage of profit which is abnormal and which is bound to encourage competition. We have recently heard that the Skenandoa Company were considering manufacturing an article similar to Cellophane in connection with Wolff & Company of Germany. I believe the deal has fallen through either temporarily or permanently, but it indicates that perhaps other viscose rayon manufacturers may look toward Cellophane as a further outlet.

"Judging from our past experience we shall have no difficulty whatever in increasing our volume of sales very materially 5111 during the coming year much more than will be necessary to offset the price reduction. You will notice in Chart B. Hatt estimates a new tonnage necessary in order to make the same profit as in 1929, of 2,100,000 pounds. Judged by all conservative present indications, we will increase our sales considerably more than this.

"If you have any comments I shall be very glad to hear them."

Mr. Gesell. Just a clarification, Mr. Renninger: You agree, do you not, that the Exhibit 347, which is the one you read first, is the report referred to in Mr. Yerkes' letter, 346?

Mr. Renninger. I do.

Mr. Gesell. Thank you.

Mr. Renninger. The Government now introduces into evidence Government Exhibit No. 462, pages 5935 and 5936.

Mr. Minicus. As long as we are clarifying things, your Honor, I would like to point out one other point of clarification. In the paragraph that Mr. Renninger read that Mr. Gesell appeared to take umbrage with, the statement is——

The Court. He just asked a simple question. He didn't take umbrage.

Mr. Minicus. Mr. Renninger said that we maintain that the material similar to cellophane is cellophane. I want to point out to Your Honor that at this time Cellophane was
a trademarked name. The duPont Company was very
5112 zealously protecting its right under the trademark Cello-
phane and would not refer to the material like cellophane or the same as cellophane, as we know it today, by the name "cellophane," and referred to it as material similar to cellophane. We find the same thing in the document that Mr. Renninger just read pertaining to Skenandoa Company at page 865. "We recently heard that the Skenandoa Comany were considering manufacturing an article similar to cellophane"—there we have it again—"in connection with Wolff & Company of Germany," who we know are manufacturers of cellophane.

Mr. Renninger. Government Exhibit 462, which is offered in evidence, is a letter from Mr. Walter S. Carpenter to Mr. L. A. Yerkes of the Du Pont Cellophane Company, dated May 12, 1930.

Government's Exhibit 462

(The letter from Mr. W. S. Carpenter to Mr. L. A. Yerkes, dated May 12, 1930, was received in evidence and marked "Government's Exhibit No. 462.")

Mr. Renninger. (Reading.) "Dear Len:

"You will recall that in discussing the proposed cut in Cellophane prices I suggested, for our consideration, the announcement now of a cut to take place some time in the future but I gathered from the reaction to this among the rest of you that it would not be desirable.

"The obvious disadvantage of such a plan is that it tends
5113 to defer the placing of orders until the date the new price
becomes effective, but in our present situation this happens to be an advantage to us.

"Let us assume, for example, that we wish to cut the price 10¢ per pound. Would it not be well if we would announce that material shipped during June would enjoy a reduction of 2½¢ per pound, during July 5¢ per pound, during August 7½¢ per pound, and after September 1st 10¢ per pound.

"The effect of this would be that our customers would not attempt at this time to build up stock to the detriment of our own position and also the supply to others.

"Also, it would stimulate a further active interest in Cellophane on the part of certain users who might not be interested at present prices but would be interested to develop its use in anticipation of a lower price a few months hence.

"In addition it would put anyone contemplating the manufacture of Cellophane in this country on very effective notice that this represented our idea of the proper price level at present."

The Government introduces into evidence Government Exhibit No. 463.

If your Honor please, before leaving Government Exhibit No. 462, I failed to read the last paragraph of that letter. The last paragraph states:

5114 "I happened to have an opportunity to talk over my trip with Lammot last night and with Fred Pickard today and I discussed this question in particular with both of them and they both seem to think that it would be a good idea."

Returning to Government Exhibit 463 now, which is a letter from Mr. J. E. Hatt, General Manager, to Walter S. Carpenter, Jr., Vice President, May 14, 1930, the Government offers that in evidence.

(Letter from J. E. Hatt to W. S. Carpenter, dated May 14, 1930, was received in evidence and marked "Government's Exhibit No. 463.")

Mr. RENNINGER. (Reading.) "Dear Mr. Carpenter:

"Mr. Yerkes has handed me your letter of May 12th to him, discussing the matter of Cellophane prices and their relation to our present position as regards volume and considering also, the varied competitive angles affecting Cellophane.

"The suggestion you make of graduated price declines, announced in advance of their effective dates, is a unique one and we believe that such action would affect our immediate position very nicely and that it would accomplish the end we are seeking.

"This entire subject has been a matter of discussion with the Executive Committee today and I am arranging to submit a recommendation along this line, as soon as it can be properly worked out in the next few days, varying only in

5115 slight detail from your suggestion. Inasmuch as our sales prices are quoted on a basis of 1,000 square inches, it so happens that a decline of approximately \$.05 per pound figures \$.0025 per 1,000 square inches, and we should like to maintain our schedules of prices on these various units using nothing less than \$.0025 in our fractions quoted.

"For this reason, we believe a \$.05 per pound decline on June 1st, together with another \$.05 decline on August 1st, and still a third \$.05 decline on October 1st, to be announced simultaneously together with a letter of detailed explanation to the trade that this is in conformity with our policy of reducing prices as volume permits, will best fit our detailed needs, and at the same time, utilize the principle of the suggestion you have made.

“This would contemplate a total reduction of $.15 per pound on Regular Cellophane, and based on April earnings, would reduce our April net of $.373 per pound to $.223 per pound. Our percent of return on the yearly basis for April was 52.58%—at least one-half of which was contributed by Moistureproof Cellophane.

“Without the benefit of any increased tonnage which price reduction will undoubtedly make possible, and disregarding Moistureproof Cellophane—which according to our plans will probably be reduced less than Regular, we should have a return of 32.1% when these declines have been accomplished.

5116 “Also, not reducing Moistureproof proportionately with this decline on Regular, and allowing for the increased total volume, we shall undoubtedly have a higher return than this.

“We believe that such an announcement at approximately the end of this month advising declines on June 1st, August 1st, and October 1st, on Regular Cellophane only, will perhaps accomplish all the points set forth in your letter and we are rather anxious to try out this plan to see what the effect of such a price procedure may be. It is entirely apparent that it cannot cause us any particular injury and it will definitely mark at least, the level of Regular Cellophane prices so far as the consideration of this feature is important to prospective competition.

“As soon as I have had an opportunity to prepare the kind of advice that I expect to send to the Executive Committee with a recommendation for its approval, I will send a copy to you for your further comments.”

The Government introduces into evidence Exhibit No. 464, page 5939 and 5940, which is a letter from Mr. J. E. Hatt, General Manager, Cellophane Department, to the Executive Committee, Du Pont Cellophane Company, dated May 19, 1930. It is entitled “Price Revision.”

(The letter from J. E. Hatt to the Executive Committee, Du
Pont Cellophane Company, dated May 19, 1930, was
5117 received in evidence and marked “Government’s Exhibit
No. 464.”)

Mr. **Renninger.** (Reading.) “In line with the discussion in the Executive Committee meeting of May 14th, we are preparing revised price list effective May 26th, reducing the price of Regular Cellophane $.05 per pound in rolls and $.0025 per 1,000 square inches in stock and cut sizes.

“In conformity with the plan suggested by Mr. Walter S. Carpenter, Jr., Vice President of the Du Pont Company, we will, with this same notice, announce further declines in the price of Regular Cellophane of the same amounts, effective on the dates of August 1st and October 1st, next.

"In line with further conversation with Mr. L. A. Yerkes, President, a copy of the proposed notice and the details conforming to the principle of Mr. Carpenter's suggestion were submitted to Mr. Carpenter, who has indicated to Mr. Yerkes, his approval of this action.

"It will require several days to get the necessary printed material, letters, price lists, etc. prepared, and meanwhile, arrangements will be made to provide for the distribution by the Du Pont Publicity Department, of news items covering this program. Effort will be made in this fashion, to capitalize as far as possible, the action indicated above.

"In the original discussion covering this matter of price revision, and in the communication sent to Wilmington 5118 showing the details of the proposed plan, the date of the first reduction was given as June first. Inasmuch as it was desired to get this announcement before the public as early as possible for policy reasons, and also, because of the short space of time intervening between May 26th and June 1st, it was deemed advisable to change the date of the first decline to May 26th which will be the date of issue of this announcement. We believe this to be more desirable than to make an announcement at this time and be obliged to bill customers, for a day or two at a higher price. Discussion with Mr. B. M. May, Vice President, indicated that this course was satisfactory.

"In the attempt to get publicity for this revision, it is believed that the end of this current week is preferable to the end of the month, inasmuch as an intervening holiday at that later date would interfere to some extent with the newspaper publicity which we hope to get on this change.

"No revision of Moistureproof Cellophane prices will be made at this time, but the announcement will say that as rapidly as production conditions will permit, price of Moistureproof will be reduced, also.

"It is hoped that completion of the printed matter can be arranged so as to make it possible to release this at the end of the week."

5119 I want to call your Honor's attention to the Du Pont statements to its customers as contained in the next three exhibits which I am going to introduce into evidence, which I now introduce into evidence, Government Exhibits 477, 478 and 479, in conjunction with the statement of Mr. Hatt in Government Exhibit 463 that these price reductions "* * * definitely mark at least the level of regular cellophane prices so far as the consideration of this feature is important to prospective competition." And also the statement of Mr. Carpenter in Government Exhibit 462 that the price reductions "* * * would put anyone contemplating the manufacture of cellophane in this country on very effective notice that this represented our idea of the proper price level at present."

(Letter from Mr. Benz, Director of Sales, Du Pont Cellophane Company, Inc., headed "To Our Customers: Price Reduction—Regular Cellophane," dated May 26, 1930, was received in evidence and marked "Government's Exhibit No. 477.")

(Letter from Mr. Benz, Director of Sales, Du Pont Cellophane Company, Inc., entitled "Important Announcement—Price Reduction, Regular and Moistureproof Cellophane," dated August 1, 1930, was received in evidence and marked "Government's Exhibit No. 478.")

(Letter from Mr. Benz, Director of Sales, Du Pont Cellophane Company, Inc., headed "Important Announcement, Price Reduction on Cellophane as of October 1, 1930," dated
5120 September 30, 1930, was received in evidence and marked "Government's Exhibit No. 479.")

Mr. **Renninger.** Government Exhibit 477 is a letter from the Du Pont Company, signed by Mr. Benz, Director of Sales and addressed, "To Our Customers." It is entitled "Price Reduction—Regular Cellophane." It reads:

"Since beginning the manufacture of Cellophane, we have consistently reduced the price of our product as rapidly as increased volume of production and sales permitted. This policy has made Cellophane available in many industries and for many purposes where former prices had prevented its use.

"The construction of new and larger Cellophane Plants was recently announced and this new production will be available in increasing quantities during the next several months.

"Accordingly, we announce price reductions on Regular Cellophane, effective on dates listed below:"

Then follow the dates May 26th, August 1st and October 1st, with a reduction of 5 cents per pound in regular Cellophane.

"With the completion of this schedule, the price of Regular Cellophane will be but 25% of the price when we began manufacture, reflecting the eleven price reductions in the past six years.

"During the past two years we have developed Moistureproof Cellophane which has distinct and unusual qualities in
5121 the protection and preservation of certain types of products.

"Increased production of Moistureproof Cellophane will be available shortly. Our price policy on this material is the same as on the Regular product. It is our intention to reduce prices on Moistureproof Cellophane just as rapidly as conditions of manufacture enable us to do so.

"This anouncement is made at this time and in this manner to give both old and new users of Cellophane a definite basis on which to consider its use on new and present items that need the advantages of a Cellophane wrap."

Government Exhibit No. 478, page 5992, is a similar letter from Mr. Benz, which is entitled "Important Announcement—Price Reduction, Regular and Moistureproof Cellophane, August 1, 1930." It is similar to the last letter. I do not intend to read it except to say that on that date a reduction of 10 cents a pound was made on Moistureproof Cellophane and 10 cents per pound on Regular Cellophane.

Mr. Gesell. You did not mean it was similar, did you? It is not. The price reduction announced was greater.

Mr. Renninger. I meant the tenor of the letter.

Government Exhibit 479, page 5993, is a similar letter from Mr.
Benz to evidently the trade, which is entitled "Important Announcement—Price Reduction on Cellophane as of October 1,
1930." I will not read this document in its entirety, except
5122 to point out that moistureproof cellophane was reduced 10
cents per pound on that date and regular cellophane 5 cents
per pound.

The Government introduces into evidence Government Exhibit 465, page 5941, which is an excerpt from the Board of Directors meeting dated September 26, 1930, entitled "Cellophane Price Situation."

Government's Exhibit 465

(Excerpt from Board of Directors meeting dated September 26, 1930, entitled "Cellophane Price Situation," was received in evidence and marked "Government's Exhibit No. 465.")

Mr. Renninger. It reads:

"The President orally commented on the current and prospective situation with regard to Cellophane, and stated that in addition to the previously announced price reduction of 5¢ per pound on Regular Cellophane, as of October 1, 1930, it was intended to reduce the price of Moisture-Proof Cellophane 10¢ per pound, following which reductions the prices, effective October 1, 1930, will be 60¢ per pound for Regular and 90¢ per pound for Moisture-Proof Cellophane; also that consideration will be given to another reduction in price to take effect after the pre-Holiday peak business has been passed, or say around the middle or end of November, 1930. After discussion, it was the sense of the Board that these plans as to Cellophane prices are in order."

There is written on this document, your Honor, the following
statement:
5123 "At Executive Committee meeting on 10/1/30, L. A. Y.
(which evidently refers to Mr. Yerkes) said J. E. Hatt did
not think further price reductions should be made until first of

1931 and then not again until May or June. Reference was made to cost figures recently prepared for C. M. A. (which is evidently Mr. Albright), on basis of 300 Regular stock size, cost of 36¢ per pound from 4-machine plant, with margin of 12¢ after selling and administrative, equivalent to about 19½% annual return on investment of around $2,000,000.

"Discussion as to differential between Regular and MP. B. M. M. (which is evidently B. M. May) thinks it should be smaller, while L. A. Y. (Mr. Yerkes) believes we should continue to take advantage of MP patent protection."

The Government introduces into evidence Government Exhibit No. 466, page 5942, which is a letter from L. A. Yerkes to Mr. T. L. Hines, Assistant General Manager of the Cellophane Department, New York, dated June 18, 1931.

(Letter from L. A. Yerkes to T. L. Hines dated June 18, 1931, was received in evidence and marked "Government's Exhibit No. 466.")

Mr. Renninger. Mr. Yerkes states:

"It is my distinct feeling, and that of our Executive Committee and the members of our Board, that we should put into effect quite promptly another Cellophane price reduction. It may or may not be necessary to wait for Mr. Hatt's return to put 5124 this actually into effect, but in the meantime I would appreciate it if you would let the Executive Committee have your immediate suggestions as to the extent of this price cut, together with a chart or figures showing what your contemplated costs are going to be in the next few months, and what the return on the investment would be with several different factors of reduction.

"I think that your minimum consideration should be 5% reduction and perhaps the maximum 10%. A 5% reduction would reduce your overall sales price approximately some 3¢ a pound which is probably not as much as you have or will reduce your costs during the next few months, and this would leave us in the same position probably that we are now in with regard to return, leaving aside any increased volume. I would therefore guess that 5% would be an insufficient reduction.

"I think these new prices should be gotten together as promptly as possible, agreed upon to be put into effect not later than July 15th or August 1st."

The Government introduces into evidence Government Exhibit 467, page 5943.

(Memorandum from F. G. Hess, Secretary, Executive Committee, to J. E. Hatt, Cellophane Department, dated July 2, 1931, was received in evidence and marked "Government's Exhibit No. 467.")

Mr. Renninger. This is a memorandum from F. G.
5125 Hess, Secretary of the Executive Committee, to Mr. J. E.
Hatt, with a copy to O. E. Adamson, entitled "Proposed Cellophane Price Revision." It is from the Executive Committee, July 2, 1931. The exhibit itself is dated July 2, 1931, also.

Skipping the first paragraph and reading the second:

"The Chairman stated at the meeting of our Board of Directors, held on June 26th, he had advised the Board that consideration was being given to another reduction in the price of Cellophane, probably around August 1, 1931, in line with our policy in the past, and with due regard for our current return on investment, development of prospective new uses for Cellophane, and the present and future competitive situation. The Board agreed unanimously in principle with this policy, leaving it to this Committee to decide as to the exact amount of the next reduction in price, which it is understood will amount to about 15%."

The Government offers into evidence Exhibit No. 468, page 5944, which is a communication from F. G. Hess, Secretary, to Mr. Hatt, with a copy to Mr. Adamson, dated July 23, 1931, entitled "Proposed Cellophane Price Revision."

(Letter from F. G. Hess to J. E. Hatt dated July 23, 1931, was received in evidence and marked "Government's Exhibit No. 468.")

Mr. Renninger. Reading the first paragraph:

"Referring to your letter of July 21st (#1027), con-
5126 firming decision reached at informal meeting of the Com-
mittee held on July 17, 1931 to make the next reduction in the price of Cellophane, effective August 1, 1931, about 5¢ per pound on both Regular and Moistureproof, or from a base price of 50¢ to 45¢ per pound on Regular, and from 75¢ to 70¢ per pound on Moisture-Proof,—This involves an average reduction on basis of sales during the last 6 months of about 7.2%, or approximately half of the reduction previously contemplated."

The Government introduces into evidence Government Exhibit No. 469, page 5945, which is a letter from W. S. Carpenter, Jr., to Mr. L. A. Yerkes, dated September 15, 1936.

Government's Exhibits 469

(Letter from W. S. Carpenter, Jr., to Mr. L. A. Yerkes, dated September 15, 1936, was received in evidence and marked "Government's Exhibit No. 469.")

Mr. Renninger. It reads:

"Dear Len:

"We have, as you know, been contemplating seriously a further reduction in 'Cellophane' prices in the near future. I think we were all of this feeling when the last forecast figures came out, but we felt it might be worth while to delay for a little while to see whether costs held about as expected.

"I gather from the Net Receipts figures for August that costs have held, at least as well as expected, and sales increased result-
ing in profits substantially in excess of the forecast. Does
5127 not this warrant our moving up on this action rather
promptly?

"Of course we are having at the present time the benefit of practically 100% operation so that our profits are figured against an investment which is perhaps too low for comfort so far as capacity is concerned. It is also true that we are passing through the peak season, but even allowing for all of this, it seems to me that the profits are higher than is healthy considering the long view.

"It happens that we are at the present time troubled with the feeling that we may be short of supplies over the course of the next month or two. Under the circumstances, would it not be well again to follow the plan which we did some years ago of announcing a reduction in price to become effective a month or six weeks hence? The effect of this, of course, is to render available as inventory all of the inventories of our customers which our customers might not be willing to draw on except for the inducement of the lower price of replacing them.

"Of course if we are to do anything it should be done quickly to be effective. I am recalling all of the difficulties which we experienced at each such time in getting an agreement as to the wisdom of lowering prices. I suggest that if you think well of it that the machinery be started in motion as early as possible."

The Government offers into evidence Government Exhibit 470,
pages 5946 and 5947. This is a letter from Mr. Yerkes to
5128 Mr. Carpenter dated September 17, 1936.

Government's Exhibit 470

(Letter from L. A. Yerkes to W. S. Carpenter, Jr., dated September 17, 1936, was received in evidence and marked "Government's Exhibit No. 470.")

Mr. Renninger. It reads:

"I have your note of September 15th. We have had and still have in mind a reduction in the 'Cellophane' prices, but I really feel that the situation is not clear enough at the moment to put this reduction in immediately as you have suggested.

"The last two months as well as the current month and probably October may or may not be a good criterion of our next year's business and I do not feel that we should be too hasty in assuming that the return earned in these excessively high months is a stable figure.

"The immediate announcement of a price reduction would not, in our opinion, materially hold up orders, as at this season of the year our customers are all running hand to mouth on their 'Cellophane' requirements for the Christmas trade. In other words, the current orders are for material that they want for immediate use.

"The 'Cellophane' price structure under the Robinson-Patman bill is very complicated. We are making a study of this situation in an endeavor to clarify what discounts can be justified.
We discussed this I think at a recent Board meeting.
5129 Until this study is completed I believe it would be very
inadvisable to make a price reduction.

"We are also giving some consideration to our freight arrangements with particular reference to the possibility of changing our present freight allowances with a view to ascertaining whether this would have any detrimental or advantageous effect on the proposed West Coast plant.

"You have not forgotten, I presume, that approximately 20% must be deducted from our figure showing return on investment for 'undistributed expense'."

I might add here, your Honor, that several of the later letters do not bear out this statement.

Mr. GESELL. Do you mean it is more than that or less than that?

Mr. MINICUS. I suggest that the letters will show it when Mr. Renninger gets to them, as he stated.

The COURT. Very well, proceed.

Mr. RENNINGER. (Reading.) "We are also probably faced with higher wage rates next year and undoubtedly higher raw material costs in some instances, notably glycerine.

"We will have an additional investment in the new Spruance plant during the next year which, if not operated as capacity, will tend to be a burden.

"All in all there is no difference of opinion I think between
you and myself except as to the time. It does seem
5130 to me that some of the above problems and uncertainties
should be clarified in order to make the proposed reduction a suitable one rather than step right in immediately and make
a percentage deduction from our present prices."

5131 The Government introduces into evidence Government
Exhibit 351, pages 874 and 875, which is a letter from Mr. J. E. Hatt, Division Manager, to Mr. L. A. Yerkes, General Manager, Rayon Division of duPont, dated December 16, 1936.

(Letter from J. E. Hatt to L. A. Yerkes, dated December 16, 1935, was received in evidence and marked "Government's Exhibit No. 351.")

Mr. **Renninger.** It is entitled "Proposed Price Reduction—'Cellophane' Effective Monday, January 4, 1937."

(Reading.) "The eleven months' net receipts to the end of November 1936 show a return on a yearly basis of 30.33%. This is before undistributed expense is deducted, and after the deduction of this item, the net becomes 23.8%."

Which seems to me at least the undistributed expense in this is different than as stated in the previous letter.

Mr. **Gesell.** No; it is exactly what he said. That is why I wanted to clarify it, your Honor, because these issues are not of very great materiality. It is exactly what he said in the other letter.

Mr. **Renninger.** Government Exhibit No. 470 states, "You have not forgotten, I presume, that approximately 20% must be deducted from our figure showing 'return on investment' for 'undistributed expense'."

In Government Exhibit No. 351 it is stated: "The eleven
months' net receipts to the end of November 1936 show
5132 a return on a yearly basis of 30.33%. This is before undis-
tributed expense is deducted, and after the deduction of
this item, the net becomes 23.8%."

Mr. **Gesell.** Which is about the 20% the document mentioned. It is 20% of the return, not an additional 20%.

Mr. **Renninger.** I was reading it the other way.

Mr. **Gesell.** Yes.

Mr. **Renninger.** In any event, the net becomes 23.8%.

Continuing reading:

"Our forecast for 1937 is for the sale of 67,000,000 pounds. This is arrived at by calculating the early months of 1937 at an approximate rate of gain comparable with the average gain for the past five months, and a smaller rate of gain more in line with continued progress over the latter half of the current year.

"Forecasting on this volume using present prices, and with anticipated increases in cost for labor and glycerin, our forecasted net return, after deducting undistributed expense, shows 22.6%. If we fail to attain the forecasted volume, this percentage would decline somewhat more.

"On a basis of the estimated volume and reducing the price of P. T. material 1¢ per pound and M. T. material 2¢ per pound, we show a return, before deduction of undistributed expense of 24.7%
and with the deduction of undistributed expense from this
5133 amount, as per the forecasted schedule, we show 19.4%.
This is, of course, after all charges including taxes have been

deducted and this return is figured on the average investment for 1937 which includes the investment in the new Spruance plant necessary to provide this volume, at the average rate which such investment will be added to the present investment during the year.

"In other words, the forecasted volume on a basis of present prices and providing for the anticipated increases in cost, would produce a return of 22.6%. The reduction proposed on the same basis of volume and anticipated cost brings the return to 19.4%. This is believed to be a close approximation of the figure which we are expected to earn on an investment, and on the assumption this return is satisfactory, we are recommending this decline be made effective shortly, as indicated.

"This reduction, if made, will reduce the return on P. T. material to 15.4%; on M. T. material to 20.8%; on specials to 17.0%—bringing the total to 19.4%, on the basis of the quantity indicated.

"If this is to be made effective on the date indicated, namely: January 4, 1937, we will be glad to have an early approval of it in order to have sufficient time to provide the necessary printed material, etc."

The COURT. Recess until 2:15.

(At this point a recess was taken until 2:15 p. m., the same day.)

5134 2:15 O'CLOCK p. m., THE SAME DAY.

Present: As before noted.

Mr. RENNINGER. If your Honor please, at the end of the

Mr. RENNINGER. If your Honor please, at the end of the morning I had just finished reading from Government Exhibit 351. The second page of that document is discussing a return of 19.4 per cent. Mr. Hatt there stated, "This is believed to be a close approximation of the figure which we are expected to earn on an investment, and on the assumption this return is satisfactory we are recommending this decline be made effective shortly as indicated."

The Government introduces Government Exhibit No. 350, page 873. This is a letter from L. A. Yerkes to Mr. J. E. Hatt, dated December 18, 1936.

(Letter from L. A. Yerkes to J. E. Hatt dated December 18, 1936, was received in evidence and marked "Government's Exhibit No. 350.")

Mr. RENNINGER. It reads:

"With reference to the contemplated reductions in price, it will be satisfactory and I believe advisable to put this off tentatively until February 1st, with the understanding that along about the

15th of January we will review the situation with the possible thought of putting it off until March 1st.

5135 "The amount of the reductions suggested in your letter of December 16th is I think all right."

The Government introduces into evidence Government Exhibit 355, pages 885, to 889, inclusive. This is a letter from J. E. Hatt addressed to Mr. L. A. Yerkes and Mr. B. M. May dated August 30, 1938. The caption is "Cellophane Prices."

(Letter from J. E. Hatt to L. A. Yerkes and B. M. May, dated August 30, 1938, was received in evidence and marked "Government's Exhibit No. 355.")

Mr. Renninger. It reads:

"Anticipating the possibility of further reducing 'Cellophane' prices to the trade as we approach the year end and with the thought of stimulating increased volume in another year, we have been reviewing our whole price set-up to determine what changes, if any, would be required on account of the Legal Department opinion in relation to the Robinson-Patman Act, and also as matters of policy in relation to converters and their effect upon important trade where printed or fabricated material is indicated."

I will not read the rest of that page as it relates to prices to converters and quantity discount arrangements, which will be discussed at a later section of our case.

I start again reading from page 887, the second paragraph:

"The purpose of this discussion is to set before you
5136 the proposed plan because in reducing the higher brackets of quantity discounts, as we are proposing here, we shall have to make a somewhat greater reduction in cents per pound from the list price in order not to penalize the large quantity users with a higher price per pound.

"Mr. Abrams has also said * * *"—I might say, that Mr. Abrams is a member of the Legal Department of Du Pont," * * * that in the users' discounts we do not need to reduce these unless we so desire, but that in the converters' discounts the reduction in amount of discount will be definitely a step in the right direction and should be done. We feel, however, as indicated above, that if we do one we should do both in order to have a consistent sale schedule: and it is this feature on which we are making a discussion with the Management and their approval to a step in this direction.

"We are not recommending this at the immediate moment because the converters have already purchased a considerable quantity of their Fall material for Christmas trade and holiday use and it is now in process with them, and we think it would be unfair to reduce their market price by reducing our own schedule until we have crossed the peak of our volume, which will probably be in the next eight to ten weeks at the most.

"If the Management finds this in order and the proper procedure we should probably recommend with it a reduction in
the 500 pound price of P. T. material of 1¢ to 2¢ per pound.
5137 The possible 4% which we would deduct from the convert-
ers' discount in some cases on a basis of the present 35¢ per
pound price figures 1.4¢ per pound, and to make a reduction to the largest of the converters would necessitate a 2¢ decline in P. T. material. There are certain of the items in P. T., such as some of the darker colors, where we should probably not reduce the price this much or perhaps at all, but for the regular plain transparent a 2¢ per pound reduction in list price with this change in quantity discounts would seem to be indicated if we are to make the new price lower on a net basis to converters than now exists.

"In the case of moistureproof, we would probably recommend a reduction of 3¢ per pound from the list price of 46¢, because the possible 4% discount withdrawn from this larger trade represents 1.84¢ per pound and we should want to make some reduction below this figure to this trade. If this plan is followed it will make the 500 pound roll price of P. T. material 33¢ per pound and the moistureproof 500 pound roll price 43¢ per pound, each of them subject to a maximum discount to the largest trade of 6%.

"The decline in net price to us will be of the order of ¾¢ on P. T. material and 1½¢ on moistureproof material below our present net. This moistureproof reduction may be as much as 1¾¢ per
pound, it not being easily possible to figure this exactly with-
5138 out a full detailed analysis of the quantity agreements, of
which there are a great many.

"Based on an estimate of 70 million pounds for next year and on the basis of 18 million of P. T. and 52 million of M. T., would indicate a reduction in net of about one million dollars. If we are successful in getting the 70 million and provided we make our forecast for the rest of this year that would represent an increase of about 8 million pounds, at an average profit of around 12½¢, which would give us our million dollars back. If this develops as calculated here the net, therefore, for another year would be in the neighborhood of eight million dollars against an investment total of approximately 32 million dollars in 'Cellophane' alone, or at the rate of a 25% return before taxes and undistributed expense.

"By the time we are ready to do this, say in December, it will have been almost three years since a major change has been made in 'Cellophane' prices. The major portion of this time, particularly during 1936 and 1937, we were confronted with advancing labor costs and advancing material costs and there was good reason

why a change was not in order. We have improved our efficiency of manufacture and the raw material costs have permitted some reduction this year over last in raw material cost totals, so that we are making costs today that are as good or some slightly better than we have ever made. We undoubtedly face somewhat
5139 higher commodity prices, but we believe that we can maintain this sort of cost unless on account of inflationary trends values of materials and labor again start a drastic upward trend.

"We would be glad to discuss this in detail and make sure that we are all in agreement as to the policy to be followed and the benefits to be worked out from this action, if approved, and comments, suggestions, or constructive criticism will be appre-
5140 ciated." I now skip to the last two paragraphs of page 889:

"This is intended to set forth the entire picture on prices and the proposed action in relation to price policy far enough ahead of actual installation to have thorough consideration from all of its angles. A discussion of this would be appreciated at your convenience."

If your Honor please, in all these documents that I have been reading, the thought strikes me that in none of this correspondence is there any mention of what Sylvania might do or might not do, whether they would retaliate or go along or anything else. It is just assumed this is the price.

The COURT. Is there any internal evidence found in the writings which you have which shows what is the concern with the Robinson-Patman Act?

Mr. RENNINGER. If your Honor please, that had to do with relation to the quantity discount agreements.

The COURT. Have they been brought to my attention?

Mr. RENNINGER. No; that will come in Section 5 of our case, your Honor.

The COURT. Very well.

Mr. RENNINGER. The Government now offers into evidence Government Exhibit No. 471, page 5948 to 5950, inclusive, which is a letter from J. E. Hatt to L. A. Yerkes and B. M. May, dated October 3, 1938.

(The letter from J. E. Hatt to L. A. Yerkes and B. M.
5141 May, dated October 3, 1938, was received in evidence and marked "Government's Exhibit No. 471.")

Mr. RENNINGER. It is captioned "Proposed Price Revision—'Cellophane'".

[Reading:] "Following our general discussion of a day or two ago which points to the necessity of revising our price schedule with converters and fabricators, we are anticipating establishing a new price on 'Cellophane' film, effective as of December 1st, and at that time are proposing, in accordance with the advice of counsel, to change our relations with converters as follows.

I will not go into the converter discounts.

I now turn to the top of page 2 of the letter, or page 5949:

"In addition to this, we are proposing to make a reduction in the list price of moistureproof 'Cellophane' of 2¢ per pound, and this calculates a reduction of 4.35% in this item.

"We shall make a reduction also in plain transparent material of 1¢ per pound, and this figures 2.85% reduction in P. T. material.

"On a basis of 75% moistureproof and 25% P. T. sales, this calculates a reduction of 3.98%, or practically 4%, from the present list prices.

"The added expenditure in connection with converters'
5142 goods set forth above, together with the subtraction of certain color materials not to be reduced, will add approximately another ¾ of 1% to this figure. This latter item is largely estimated but is believed to be ample to cover the changes proposed. Therefore, in total this amounts to a decline of 4¾% from the present level of prices, and on the basis of the present tonnage, represents a figure just over one million dollars.

"If we are successful in adding the eight million pounds anticipated new business, which we shall probably forecast for 1939, in excess of the present volume, we should on this basis return approximately the same dollar yield in 1939 as will be the net return for 1938.

"If this develops accordingly as set forth here, it will provide a basis at the end of another year for further consideration of our price position, looking to the possibility of a further decline.

"If, however, the added volume indicated is not secured, either on a basis of improved business conditions, or by the stimulation of the lower price level, then we should take a somewhat lower net in total dollars in 1939 than now appears probable for 1938.

"We believe, however, that the possibility of additional further tonnage and our present position as to costs warrant a reduction of the extent indicated herein.

5143 "This in reply to your request for a detailed memorandum as to the extent of the proposed cut and the amount of money involved. If further detailed information is desired, we will be glad to attempt to supply it on request."

Skipping the next paragraph temporarily, "On this basis it is our expectation to realize approximately 27%, before undistributed expense, on this investment. Should the volume increase somewhat more substantially than anticipated, the return would be greater than these figures.

"We trust this will be found in order and any comments, criticisms or suggestions will be appreciated."

The Government offers into evidence Government Exhibit No. 357, pages 893 to 901. This is a letter with various charts attached from J. E. Hatt, Division Manager, to Mr. L. A. Yerkes and B. M. May, dated October 9, 1939.

(The letter from J E. Hatt to Mr. L. A. Yerkes and B. M. May, dated October 9, 1939, was received in evidence and marked "Government's Exhibit No 357.")

Mr. **Renninger.** (Reading.) "Following our discussion of a few days ago regarding the return on investment by plants and following the proposed reduction in selling prices, we have had this recalculated on a basis of present material costs which it seems possible to continue at least very largely for several months, but adding to the cost the proposed wage increase and certain salary revisions, and then have calculated such costs 5144 on a basis of 80% capacity and 90% capacity on this assumption that our production and sales will be 25% P. T. and 75% M. T.

"These revised figures are attached, and they show a sufficient percent of return on investment in both cases to permit of the price revision discussed.

"Operating at 80% of capacity and producing and selling 25% P. T. and 75% M. T. will return 20.34% on the investment after Undistributed Expense."

The charts attached give the operative income by plans producing 300 plain only or 300 moistureproof only, operating at 90% of capacity and operating at 80% of capacity. These charts show that the percent return averages—some charts show return before undistributed expense from 20.17 and 14.52 after; others show by plant a return of 27.85 before and 20.05 after. As the letter itself states, all the plants together, the return is expected to be 20.34% after undistributed expense.

The **Court.** May I see how that chart is constructed?

Mr. **Renninger.** I have some of it underlined, your Honor.

The **Court.** That won't make any difference.

5145 Mr. **Renninger.** The Government introduces into evidence Government Exhibit 358, page 902. This is a letter from Mr. C. M. Albright to Mr. B. M. May, dated February 2, 1942.

(Letter from Mr. C. M. Albright to Mr. B. M. May dated February 2, 1942, was received in evidence and marked "Government's Exhibit No. 358.")

Mr. **Renninger.** The first part discusses quantity discounts which will be discussed at a later date. Reading from the second paragraph from the bottom:

"Since we are now allocating Cellulose Film, the writer has difficulty in reconciling our present policy in not also taking advantage of this situation for discontinuing volume discounts on Cellophane and "Cel-O Seal". Of course, the argument would be that some of the larger users would probably use less Cellophane without the benefit of the higher discounts. As opposed to this argument, we could get along with less business and still substantially make the same return on our Investment. This would also have the effect of conserving much needed raw materials."

It is the Government's contention that consequent upon duPont's arbitrary pricing practices, unjustifiable price spreads have appeared between various types of cellophane. These price spreads have persisted. This results, according to the Government's contention, as a direct corollary to duPont's power to control prices.

5146 An interesting sidelight to this conception is the large price spread between plain cellophane and moistureproof, whereas the duPont documents will show that there is very little difference, if any, in the cost of manufacture of plain cellophane as contrasted to moistureproof.

The Government offers into evidence Government Exhibit 472, pages 5951 and 5952. This is a letter from J. E. Hatt of the Cellophane Department to the Executive Committee dated November 14, 1928.

(Letter from J. E. Hatt to the Executive Committee dated November 14, 1928, was received in evidence and marked as "Government's Exhibit No. 472.")

The Court. Just a minute. I did not get the significance of that last statement you made. It is not in the writings.

Mr. Renninger. I said an interesting corollary to the Government's contention that unjustifiable price spreads have existed between various types of cellophane is the fact that the price spread between moistureproof cellophane and plain cellophane is quite large.

The Court. What does that have to do with the Sherman Act? I have not got the point.

Mr. Renninger. Well, it is relative to the power to arbitrarily fix prices.

5147 [Reading from Exhibit 472:] "Subject: Proposed Price Revision.

"At the present time, we charge one-half cent per thousand square inches more for Cellophane in lots of two million square inches and over and less than a case lot, than we charge for a full case lot of cut-to-size material.

"This amounts to $35.00 per case, and in the instance of the large packers and baking companies, they frequently want to give us orders for considerably more than a case of material of one size, to wrap some particular item in their different plants. Some of their plants are not large enough to use a full case lot of seven million square inches, within a reasonable time, and yet they desire to put out this particular unit, at all their various plants.

"The present charge of $35.00 per case repays us several times over the cost of cutting this material and packing it in more than one box.

"This point has been made a point of considerable resistance by some of the larger trade, particularly in view of the fact, that competition almost invariably, with large trade, sell less than case lots at case price where urged to do so.

"Accordingly, it has been deemed advisable to include, in the next price change, the following special paragraph, to the salesmen only, for use in connection with our agreement accounts, only:

5148 "'To agreement accounts only, operating more than one plant, and placing orders at one time, in excess of a case lot of one kind of Cellophane, in one cut size, for shipment at one time, to more than one plant, the case lot price plus ¼¢ per thousand square inches will apply, provided no single shipment is less than 2 million square inches.'

"This paragraph will reduce the price to that larger and most desirable trade, on an assortment of orders for the same size, to a differential of $17.50 per case, which will more than cover our costs and packing charge, and the proper percentage of profit thereon, and will, we believe, be much more acceptable to them than the present position, which is reasonably hard to defend, on account of the excessive charge now made, under the conditions described.

"The comment and criticism of the Executive Committee on this, which is regarded as a necessary and progressive step in the sales plan, will be appreciated."

I now refer to Government Exhibit 347, which is already in evidence. I just wish to read several paragraphs from this letter, starting at the bottom of page 866:

"There is a further point. In the next price revision, the
differential between cut-to-size and stock size sheets, per
5149 1,000 square inches, which at present is ¾¢, should be
brought closer together. This differential has maintained
for sometime, and when originally put in the price list, represented approximately a 10% differential. The continued reductions in price per unit now leaves this differential at approximately 18% over the stock size sheet price.

"This, we regard as inadvisable because of the purchase of large quantities of cut size by certain trade, and while it will probably be unsatisfactory to the jobbers, nevertheless, it seems the desirable thing to do, and will, accordingly be recommended in the next price revision."

I now refer to Government's Exhibit 463, which is already in evidence. Here also I just wish to read two paragraphs from page 5938:

"Without the benefit of any increased tonnage which price reduction will undoubtedly make possible, and disregarding Moistureproof Cellophane—which according to our plans will probably be reduced less than Regular, we should have a return of 32.1% when these declines have been accomplished.

"Also, not reducing Moistureproof proportionately with this decline on Regular, and allowing for the increased total volume, we shall undoubtedly have a higher return than this."

I wish to refer also to Government Exhibit 464, which is already in evidence, where they talk about reference to the moistureproof cellophane prices not being reduced at that time,
5150 in May, 1930, and Government Exhibit 465, which is
already in evidence, in which you may remember there was discussion between Mr. May and Mr. Yerkes as to whether they should continue to take advantage of what they consider the MP patent position and not decrease moistureproof cellophane to the same extent as plain.

I now refer to Government Exhibit 354, which is already in evidence, introduced several days ago, which is a letter from Mr. Yerkes to Mr. Hatt, dated October 26, 1937. Reading from the third paragraph:

"Take the old example of the difference between P. T. and M. T. I notice that our to date figures are almost exactly alike on the costs of these two; total P. T. cost is 27.5 and total M. T. cost is 27.2, the M. T. being actually cheaper than the P. T. Of course the profit on the M. T. is twice that on P. T. Shouldn't we therefore endeavor to throw all the P. T. business that we possibly can over to M. T.? This brings up the broad question of whether we should reduce the price of M. T. a little and either leave P. T. alone or put it up in an endeavor to have all our business in M. T.

"This may have some operating difficulties but I do believe there is something to be done in the relationship between our costs and selling prices."

5151 The Government offers in evidence Government Exhibit No. 364, page 909. This is a memorandum from C. F. Brown to T. L. Hines, dated June 27, 1946, subject, "Cellophane Price Increases."

(Memorandum from C. F. Brown to T. L. Hines, dated June 27, 1946, was received in evidence and marked "Government's Exhibit No. 364.")

Mr. RENNINGER. (Reading.) "If it proves necessary or advisable to increase prices, the Sales Staff recommends consideration of the following when OPA regulations permit:

"300 MT to be increased from 41¢ to 44¢. This would equal on an area basis our pre-war price—$.02095 per 1,000 square inches at 44¢ present gauge versus .02103 per 1,000 square inches at 41¢ pre-war gauge.

"We also favor a greater proportionate increase on 300 PT to materially reduce the present 8¢ spread and, if possible, provide the same operating return as 300 MT.. Mr. Haley has been asked to work this out.

"Prices on heavier gauge and colors should be reviewed on the basis of their present operating return."

As another example of duPont's arbitrary fixing of prices it is the Government's contention that export prices for cellophane for many years were substantially below those prevailing in the
domestic market. This is another indication that duPont
5152 was able to arbitrarily fix the price of cellophane in the do-
mestic market. If there had been free and open competition in the domestic market it would be evident that prices in the domestic market would at least be the same, if not less than prices for export. Here we have a monopoly price. It is the Government's contention that the fact that cellophane prices were higher in the United States than in export tends to show, one, that duPont did not fear domestic competition; and, two, duPont did not fear imports.

The Government offers in evidence Government Exhibit 366 at page 911. This is a memorandum from C. F. Brown to Mr. George Andrews, New York, dated April 17, 1946, subject "Cost of Export Business."

(Memorandum from C. F. Brown to George Andrews, dated April 17, 1946, was received in evidence and marked "Government's Exhibit No. 366.")

Mr. RENNINGER. (Reading.) "Attached is a statement showing actual costs and operative earnings on export business in the year 1945 as compared to selling the same tonnage in domestic markets. You will note that the operative earnings average approximately 3¢ per pound less in export and that the principal reason for this is due to larger commissions and discounts and also to freight and delivery.

"This emphasizes the great need for taking the steps we propose
in reducing Duperial discounts and in eliminating freight
5153 charges to equalize with our domestic policy. You will
notice that the extra cost of handling export business at the plants is considerably less than had been estimated before and

runs only about ¼¢ per pound, mostly for special packaging. This also gives the opportunity for some savings.

"If you will remember, some time ago we discussed the possibility of reducing our agents' commissions to below 10%. I think we ought to review this again. Would it be logical to reduce the discount from 10% to say, 5%, on indent business only, where the customer does not actually take the film into stock?"

Mr. GESELL. Do I understand the Government claims that shows there was an arbitrary difference between export prices and domestic prices?

Mr. RENNINGER. If your Honor please, I would like to finish this section. I have several other documents in here which I wish to bring to your attention.

Mr. GESELL. Very well.

The COURT. Proceed, Mr. Renninger.

Mr. RENNINGER. I now refer your Honor to Government Exhibit No. 367, which is already in evidence and has been read. I will not read it again at this time.

I also wish to refer to Government Exhibit 368, which is already in evidence. However, this was read quite some time ago by
5154 Mr. Tubridy and with reference to perhaps a different item. I would like to read parts of it again at least.

I will just read the second paragraph of this Exhibit 368, which is a memorandum with charts attached from C. A. Haley, Manager, Planning Section, to Messrs. T. L. Hines and A. Kunsman, dated April 19, 1946, entitled "Export Sales—1945."

The second paragraph reads:

"Attached hereto is an exhibit showing the comparison for the year of 1945 between export sales operative earnings on the same volume and type if sold in the domestic market. It indicates that we could have made 27.5% more profit if this material had been sold domestically. The difference is represented in a higher domestic selling price, lower discounts, lower freight and delivery, selling expense and slightly lower mill cost."

Mr. GESELL. Now, if your Honor please, when motives are being imputed to us in these documents, I think I can rise and point out the omission of significant data. By skipping the first paragraph the Government has again distorted this material and failed to show the reason for our export price policy.

I think if I rise and raise these questions as we go along we will get ahead quicker than if I have to go back over them all.

5155 The COURT. I agree, Mr. Gesell, if there is to be editorial comment, you should have the right to make yours, and if it will not unduly interrupt the presentation I should permit you to interrupt at any place where the full import of the writing is not given.

Mr. **Gesell.** I think this is an example by the failure to read the first paragraph.

Mr. **Renninger.** If your Honor please, I am perfectly willing to read the whole document.

The **Court.** No, just read the first paragraph.

Mr. **Minicus.** The paragraph has been read once, you know, your Honor.

The **Court.** How many months ago?

Mr. **Minicus.** Quite a while ago, but it is in evidence.

The **Court.** I don't recall the paragraph, so refresh my recollection.

Mr. **Renninger.** The first paragraph reads:

"We have been wondering for some time, what penalty, if any, we paid by selling in the export market over selling the similar material in the domestic market. This, of course, presupposes that the added volume could be sold in the domestic market, which happens to be true at the present time. At the time we entered the export market, however, we were actually looking for 5156 additional markets for our product and had the production available for sale."

I would like to call your Honor's attention to the chart on the second page which shows the gross sales, the price per pound as sold actually in export, and the price that would have been obtained on this amount if sold domestically. It shows a difference there in the price of cellophane sold in the export market as contrasted if the cellophane had been sold in the domestic market.

The Government offers into evidence Government's Exhibit No. 369, page 917 to 921, inclusive. This is a letter from Mr. Haley to Mr. Swint, with various letters attached, which are described in the letter. It is dated May 2, 1946.

(Letter from C. A. Haley to W. R. Swint, dated May 2, 1946, was received in evidence and marked "Government's Exhibit No. 369.")

Mr. **Renninger.** (Reading.) "Attached hereto are copies of letters we propose to send (1) all foreign distributors except Duperial, and (2) Duperial.

"We believe that Mr. Brown has already discussed with you our plan to increase our export prices to the extent permissible under O. P. A. regulations.

"We are having these letters checked by the Legal Department to determine whether or not we are in violation of any cur- 5157 rent rules and ask that you kindly let us have your opinion as to the desirability of making these changes from your point of view, effective on June 1st of this year."

The first attached letter at page 918 is a letter addressed to "All Foreign Distributors Except Duperial," and is signed by C. F. Brown.

"Due to mounting costs of labor and materials, we find ourselves no longer in a position to sell in export markets under terms more favorable than those applying to our domestic trade.

"All film in the U. S. has been sold F. O. B. most logical plant. On export shipments, for some years, we have paid transportation from plant to port. This practice will be discontinued and your orders will be billed F. O. B. logical plant, which in your case is Spruance at Ampthill, Virginia. In cases where, for our convenience, shipment is made from another plant, equalization of transportation will be made on Ampthill. This applies to all types of film except colors which are manufactured only at Buffalo, on which no equalization will be made. This conforms exactly to U. S. practice."

Then there is a schedule of transportation costs that follows.

5158 "Extra charges will be made for special export packing, such charges to represent the difference in actual cost between such packing and domestic packing. Schedule of such extra charges follows:"—which I will not read.

The second attached letter is from Mr. C. F. Brown to Duperial, Argentine, Brazil, Uruguay. It reads:

"Due to mounting costs of labor and materials, we find ourselves no longer in a position to sell in export markets at lower than U. S. prices. Also, we believe, from a competitive standpoint, such lower prices are not now necessary.

"We have therefore decided to adjust all export prices to equalize U. S. prices and terms."

I will not read the remainder of that letter.

The Government offers in evidence Exhibit 370, page 922. This is a letter from Mr. Jenney, Assistant Director of the Foreign Relations Department, to Mr. C. A. Haley, Manager of the Planning Section, dated May 8, 1946.

(Letter from J. K. Jenney to C. A. Haley dated May 8, 1946, was received in evidence and marked "Government's Exhibit No. 370.")

Mr. Renninger. It reads:

"With reference to your letter of May 2d attaching copies of letters that you propose sending to your foreign distributors and to the Duperial Companies, we have no particular comment to make.

5159 "We assume that in the case of those distributors which are foreign offices of the Company, it will be possible to increase local prices by the amount of the price increase being made to them.

"We particularly wish to point out to the Duperial Companies that your action in reducing discount from list price from 15% to 10% does not in any way change the overall arrangement with them under which they are entitled to purchase goods from their shareholders at a price which will allow them a specified gross margin. In order that there may be no misunderstanding on this subject, we would like to transmit the letters that you propose sending to the Duperial Companies. I would therefore appreciate it if you would ask Mr. Andrews to send these letters to us for forwarding."

Mr. GESELL. Does your Honor understand that duPont is a shareholder in Duperial? It is a subsidiary of duPont.

The COURT. I did not at the moment, no.

Mr. RENNINGER. The Government offers into evidence Government Exhibit 371, page 923, letter from C. A. Haley to Mr. T. L. Hines, dated May 14, 1946.

(Letter from C. A. Haley to Mr. T. L. Hines dated May 14, 1946, was received in evidence and marked "Government's Exhibit No. 371.")

Mr. RENNINGER. It is entitled "Proposed Price Change to Cellophane Export Accounts."

5160 "Our terms of sale and discounts to the export trade have not been the same as domestic. We have always quoted F. A. S. prices and have allowed discounts of as much as 15%. The return we have received on export business has been somewhat less than we have received on our domestic business, due to these factors plus the increased cost of preparing export shipments and increased selling expenses through the maintenance of an export sales organization.

"Under O. P. A. regulations, prices cannot be increased to export accounts, but prices may be adjusted so that the prices billed on export and the terms of sale may be the same as domestic. It is proposed, therefore, that we effect three changes in our export pricing policy:

"1. Establish a maximum discount of 10%, the same as domestic.

"2. Quote terms f. o. b. plant, freight equalized with nearest port of exit.

"3. Charge a premium over domestic prices for special export packaging in wooden cases. This premium to equal the excess cost of such package.

"This proposal has been submitted to the Foreign Relations Department and has been approved by Mr. J. K. Jenney in his letter of May 8th. It has also been submitted to the Legal Department and has been approved by Mr. John C. Harbert in his letter of May 3rd. It is therefore planned to proceed with the change, as outlined."

* * * * *

5161 Mr. RENNINGER. Yes.

It is the Government's contention that duPont has imposed its prices upon other sellers of its product. By this statement I don't mean that duPont says this is the price that you must sell our product at and you cannot deviate one iota from this price, but it is our position that duPont pretty well policed the industry. It was careful to see that its price structure was maintained.

The Government intends to show that the defendant did all within its power to see to it that the prices quoted for its product by its distributors was substantially those which it felt should be the prices charged. This was done by various controls that it placed upon the distribution and sale of cellophane, which will unfold more clearly when we reach that section of the case dealing with distribution.

In the monopoly phase of this case we desire merely 5162 to show in a general way some of the influences that duPont exercised over its distribution outlets.

Mr. GESELL. May I inquire whether this charge relates to jobbers or does it include other distribution outlets? Because I thought we had simmered that issue down this morning. Is it just jobbers, your Honor?

The COURT. What about it?

Mr. RENNINGER. In the distribution phase of the case we will take up not only jobbers, but we will discuss the various restraints on converters, promotional converters, regular converters, jobbers, and so-called agent, and various restrictive practices.

Mr. GESELL. And your charge is that we policed the prices of those different groups?

Mr. RENNINGER. That you pretty well policed it; yes.

Mr. GESELL. I want to know what the issue is, if your Honor please. Is the charge that we policed the prices of the converters, the agents, the fabricators, and the jobbers, or only one or another of that group?

The COURT. Which if any of the groups were policed? That is the simplest way of getting at it.

Mr. GESELL. Thank you, your Honor.

Mr. RENNINGER. If your Honor please, due to the specialized phase of our case, I would like to have that question properly 5163 answered. I frankly don't know as to all the ramifications of the distribution section of our case.

Mr. GESELL. I am talking about the price case here, your Honor, that he is on now.

Mr. Renninger. As to what I am trying to say here now is just an indication as to the policing of the industry or the fact that duPont pretty well saw to it or oversaw or reviewed the prices charged by the agents, and even when into the prices charged by the converters. I don't mean by that that they made the converters or the agents or the jobbers charge that particular price. I am just implying that they attempted to so-called oversee the whole industry to see that prices didn't get out of line.

Mr. Gesell. That is just another example of the room full of feathers I have been trying to fight during this case. What is the charge? Not "sort of, kind of, probably looked at, maybe," but "What did we do?" so that we can meet it.

Mr. Minicus. We have filed a complaint in this action, your Honor; we have had pre-trial proceedings; we have filed a trial brief of which they have a copy. May I suggest the more normal procedure if Mr. Gesell will let Mr. Renninger proceed with his evidence, if he finds it immaterial to any issue of the case he can challenge it on objection.

The Court. The difficulty is he doesn't know what to challenge because he doesn't know what is being presented. It seems to me a fair and simple question, the question I put. Which of the various instrumentalities was policed by duPont in the industry according to the Government's case? 5164

Mr. Gesell. As to price.

The Court. As to price. I don't see anything complex about that. You ought to be able to answer that right off the bat.

Mr. Renninger. If your Honor please, principally——

Mr. Gesell. No.

The Court. No.

Mr. Renninger. Jobbers and agents.

The Court. Now we have it.

Mr. Renninger. There will be indications in here as to what I would call policing of the industry over certain converters, but jobbers and agents principally.

Mr. Gesell. Only? Is that right, your Honor? Only?

The Court. Only, but——

Mr. Gesell. Only, but——

Mr. Minicus. I don't see what right Mr. Gesell has to confine our proof. Neither Mr. Gesell nor ourselves are the finders of fact in this case. It may be that the evidence itself will show something different to you than it does to us and we have a right to have that open.

5165 The Court. What I think Mr. Gesell is doing is he is trying to sharpen the issue not only to help me, but to help himself. It is purely a selfish interest. He wants to know what he is going to have to meet. He suggests, What is so complex about who was policed by duPont? What classification? You said agents and jobbers. If it appears the proof is such that that may affect others later, why, of course I will be glad to hear it. But we want to know at this point what is your position.

Mr. Gesell. That is right.

The Court. And we have the answer so far as to two classes. Is that correct?

Mr. Gesell. Yes, your Honor.

The Court. Proceed.

5166 Mr. Renninger. The Government introduces into evidence Exhibit No. 5172 at page 4830, dated May 14, 1940. This is a memorandum from V. C. Clark to C. F. Brown, subject: "Jobber Distribution."

(Memorandum from V. C. Clark to C. F. Brown, entitled "Jobber Distribution," dated May 14, 1940, was received in evidence and marked "Government's Exhibit No. 5172.")

Mr. Renninger. It reads:

"It has always been my understanding that the only business that we would handle for shipment direct to an organization and billing to another would be on accounts that we are selling direct or to one of our licensed agencies.

"I find however now that we are not only doing this with agents but also the jobbers who are intended, according to my understanding, to handle only small business, business that represents poundage too small for either we or our agencies to handle.

"For instance, Elite Baking Co., of Akron, O., reports they have been buying 500 lb. quantities from Conley, and also a jobber by the name of Rohner. They sell at 41c a lb. and the customer is complaining because they did not equalize the freight from Buffalo. Shipments are direct from our plant at Old Hickory, Tenn.

"Another instance is Sweaney's Bakery, Canton, O., who buy in 500 lb. lots from Conley. Often he takes only four 5167 or five rolls at a time when he runs out of a certain size and for this he pays 42c per lb. delivered.

"It is apparent such jobbers as mentioned are using 'Cellophane' as a loss leader in order to insure business on other products which they handle.

"The breaking down of our price structure by these small jobbers does not help us in the fields where they operate.

"Should we not refuse to sell 500 lb. quantities for direct shipment to a customer when order is placed by a jobber."

There is a note at the bottom of this memorandum which states: "Discussed with E. C. Brown who looked upon, as I do, jobber sales of 500 pound lots with disfavor. Signed E. C. L." That is evidently E. C. Lake.

Then there is a memorandum at the top of the page, "Discussed with C. F. B. who agreed to let matter ride for time being and so long as jobbers direct shipments to customers did not grow abnormally."

The Government offers into evidence Government Exhibit 5205, page 4905. This is a memorandum from C. F. Brown to Mr. Eckelberry, of the Legal Department, subject: "Agreements by Agents."

(Letter from C. F. Brown to J. W. Eckelberry dated July 30, 1941, was received in evidence and marked "Government's Exhibit No. 5205.")

Mr. Renninger. Before reading this document, I might
5168 say, your Honor, that it is the Government's contention
that the so-called agents listed in the documents herein are in reality not agents at all but independent contractors. However, the proof of this phase will be deferred until we come to the distribution section of the case.

The Court. What legal significance does the difference have?

Mr. Renninger. As an independent contractor they cannot fix the prices at which the independent contractors sell the goods, whereas if they are agents, there is some question in certain instances under certain conditions, the price can be fixed by the manufacturer.

The Court. I see.

Mr. Renninger. (Reading.) "As you probably know, we authorized our agents Catty, Brooks and Zellerbach to extend to their customers agreements essentially identical with those which we execute with our consumer users.

"It has just come to my attention that these agents have not been notified of the change in form which we have made recently in our user agreements, nor were they advised about six months ago when we made an even more important revision.

"Of course, the intent and specific requirements are still the same—only the form has been changed.

"Would you suggest that we send them copies of our present
form, stating that we have made certain revisions which
5169 they can incorporate in their own form if they so desire?
As I understand it there is no particular reason why we should insist that their form be identical as long as prices, discounts and terms are the same. Is this correct?"

* * * * * *

5182 Monday, April 16, 1951, 10:15 O'clock A. M.

Present: As before noted.

Mr. Minicus. If your Honor please, at the conclusion of the session Friday afternoon Mr. Renninger had just completed his evidence under the heading of the defendant's power to set an arbitrary non-competitive price and was about to embark into another subject under "Prices," concerned with the sections that we had mentioned earlier whereby because of certain abnormalities in the pricing system, it was necessary under our contention for the various manufacturing units in this industry to come together in some sort of an accord on the prices.

We are just reaching that point, and I think to maintain the continuity of evidence it would be advisable at this time for the Government to call a witness.

Mr. Gesell. Your Honor, we have no objection to that, but I wonder whether perhaps it would not be more orderly for me to complete my comments on the documents that Mr. Renninger spent all of Friday on before we turn to additional phases. I have not commented on all the day's documents that came in Friday.

5183 Mr. Minicus. We have no objection to that, your Honor.

The Court. All right, proceed

Mr. Gesell. The group of documents which were considered on Friday other than the price lists themselves are the series that run from Exhibit 1 in the Government sequence through Exhibit 474. Most of these documents as we read them, your Honor, are ordinary business documents dealing with the problem of establishing prices, and I don't intend to go over each of the documents and take them up with the Court. I do want to deal with the Government's contentions as they pose the issues here and with a few specific documents.

The first contention advanced is that the prices established by duPont at which it would sell the cellophane it manufactured have not been determined as a result of what the Government calls the interplay of competitive market factors. It is our contention that the prices were determined as the result of competitive market factors. We take issue with the Government on that contention as a matter of fact. Whatever its legal significance may be, we say as a matter of fact there was an interplay of competitive market factors.

I think the documents disclose those market factors in a very real and graphic way, mostly in portions which were not read.

5184 In the first place, speaking generally, it was certainly clear throughout the documents that Mr. Renninger reviewed that the consideration which duPont gave to lowering its price was a consideration which was prompted by the constant recognition that as the price was reduced broader markets were opened up and larger volume obtained.

5185 While I am precluded from discussing where that volume came from and what the market was that the prices were being set forth, it is perfectly apparent that if additional business was constantly obtained through the reduction of price, that that was the result of market factors. We get some indication of the detail of these in the documents the Government offered. If I may refer to two of them briefly, I think I can point up our position.

One is Government Exhibit 4660 at page 5909. There the report on prices says, "The gist of the results"—that is, of this survey that was made into the meat and related business—"was that the cost of cellophane is too great to permit of its use in such a highly competitive industry the principal branches of which cited the following facts:"

"Highly competitive industry" is not consistent with prices being established without regard to the interplay of competitive market factors.

Now, what were the three branches? First, bacon. This is sold on basis of 1¢ per pound profit. The use of cellophane would add more than one cent per pound to present production cost.

Lard—Present box with liner costs ½¢ each. A direct wrap of cellophane, without box, would cost over one cent.

> Cheese—To displace glassine paper, now used as an
> 5186 outer wrapper for their carton, with cellophane would represent an annual cost of $100,000.00 as against a present annual cost of $9,000.00.

Mr. Minicus. Objection, your Honor. When we referred to such things as rubber and glassine, Mr. Gesell objected. I think if the restriction is applied to the Government, it should apply to Mr. Gesell also.

Mr. Gesell. This is quite a different issue, your Honor. I am not talking here about the issue covered by your opinion which, as I understand, is whether or not cellophane is a distinct part of trade and commerce or should be taken measured with relation to these other materials. Here we are dealing with a direct question of intent and a direct question of an issue tendered by the Government as to whether there is an interplay of competitive market factors. It has nothing to do with what the part of trade or commerce is. That, I understand, is foreclosed as an affirmative defense under your Honor's opinion. But certainly when the charge is repeatedly reiterated here by the Government that there has not been an interplay of competitive market factors, and when as on Friday they read a portion of a report dealing specifically with the problem of glassine, Exhibit 347, certainly I consider I am not violating your Honor's ruling in pointing out that the price policy established by duPont was a policy which was related to the interplay of competitive market factors.

5187 Mr. Minicus. I would like to point out, your Honor, that that exhibit that Mr. Gesell just mentioned, 347, was only read by the Government on his insistence. I would also like to point out, your Honor, that Mr. Gesell has just made the same argument that I made when he raised his objection to our use of rubber and glassine.

Now, I would like to try to make clear at this time, if your Honor please, we feel exactly the same way Mr. Gesell does about this thing, and we have no objection, providing both sides can mention these products in other patterns than that of a substitute material. In other words, I don't believe that the word should be "verboten" in this case. We only think that their use as a substitute for cellophane is the thing that was debarred by your Honor's opinion. I just point out here the sword should be two-edged and cut both ways.

The COURT. My understanding is that the opinion was concerned with the question of substitute materials. Mr. Renninger on Friday brought forward the charge that there was no competitive interplay of market factors, and in order to meet that statement I think it would be highly unfair to Mr. Gesell to prohibit him from attempting to make answer to that argument.

Mr. MINICUS. I thoroughly agree, your Honor. I just want to be assured the Government will have the same right in the same context——

5188 The COURT. I find it good policy to decide questions when they are presented to me, and I don't think I am going to make any decision in vacuo as to what you can or cannot do as you unfold your case. For the present purposes, if there has been an objection to Mr. Gesell's statement this morning or the subject matter he is now about to examine, it is overruled. Proceed, sir.

Mr. GESELL. Turning to the other exhibit, which is of the same character, your Honor, 347, we find a comparable statement which is again cited as merely illustrative at page 869. The report says, "The reasons for consideration of proposed price revision at this time are largely the attempt to open up new and large markets on possible units of lower price commodities—commodities to be wrapped—and also the present and prospective competitive situation not only as regards other manufacturers of a material similar to cellophane, but also including the recent improvements in glassine."

5189 So briefly, without laboring this point, it is that this is a highly competitive market where cellophane was constantly seeking to enter to meet the competition provided by all kinds of other wrapping materials and that there was a clear interplay of competitive market factors.

Mr. MINICUS. We have now crossed the line, I submit to your Honor, and have gone into a discussion of the competition between——

The COURT. Mr. Gessell said he is not going to labor the point.

Mr. GESELL. With regard to this, we have tendered the language from Judge Hand's Aluminum decision. You will recall Mr. Renninger read that to the Court on Friday. We say that that language, whether it is dicta or whether it is decision or whatever it means, is not pertinent here because of the factual differences between our case and the case which Judge Hand had before him. There he was dealing with a manufacturer who accounted for one hundred per cent of the domestic production. Obviously such a manufacturer when he set his price was establishing the price for that particular product which was found to have a distinct market apart from any other product.

We say our situation is different. Our situation, first of all, is different in that there was another producer here of cellophane,
taking it even on the Government's narrow view of this case,
5190 and we have evidence here that there were price differences,
that there was price competition, and we have two different
manufacturers establishing prices. So we do not have the absolute situation which applied in the Aluminum case where you had one hundred per cent of the production.

We also, your Honor, had, as these references to glassine illustrate, the prices of lower commodities to meet if we were to sell our product. And we therefore were not free to manipulate or change the price as we chose because we were strictly controlled and limited in our ability to establish prices by the prices of the competing materials. So much for the first contention of the Government.

The second is that since 1935 duPont has been able to fix a rigid and stable price, and it is stated that that is a clear indication of monopoly power over prices. We have two answers to that, your Honor.

In the first place, it was not a rigid and stable price because it varied in that period. The prices of the two producers were different in that period as to certain products at certain times as will appear when the price schedules are analyzed later today, and the price also was far from rigid in that in spite of increasing costs and substantial increases in the wholesale commodity prices and all the other measurements, these prices continued to decline. The
rigidity existed only during the period of OPA price control
5191 when for a substantial period there were not any price
changes.

But if the Government says, "This shall be the price" or "This shall be the maximum price" because I guess these were under the general max. order, you had a factor in the market price certainly operating on the rigidity of prices which in itself is sufficient to answer the charge that this all resulted from some exercise in monopoly power.

The third contention is that duPont fixed the prices to yield a consistently high pre-determined margin of profit. Well, I completely fail to understand that even when they say, as they usually do, that they fixed them arbitrarily to yield a pre-determined margin of profit.

In the first place, all these documents show, as I read them, is that given an investment and given certain ascertainable costs, the management of the company was determining whether or not they could establish a lower price for their product and still make the type of return on their investment which in good business management they were required by the governing bodies of the duPont Company to make.

It is perfectly clear they never made the precise profit that they anticipated. These were estimates, analyses, studies; sometimes the profit was more; sometimes it was less than they expected when they established the price as factors in the market place operated.

But it is certainly the most normal and natural thing to find
5192 business men sitting down and saying, "If we change this
price are we going to get our costs back? Is the additional volume going to offset the reduction in spread between our total costs and our price?" They are the normal business discussions in establishing price and nothing more that I can see.

They say that it is particularly significant that in setting these prices we did not make any reference to Sylvania. Well, I would have thought it was rather significant for a different reason, that if we had some dire plot or agreement with Sylvania that these were going to be jointly established prices that you will find in this whole mass of material some reference to whether Sylvania agreed to go along, whether this was going to be the new collusive price or whether it was not. But we did not refer to Sylvania in these reports because we were out broadening the market and looking for new opportunities; we were not out after Sylvania accounts; our big interest was in broadening the market and getting further. Sure, we took business away from them, and frequently, but our interest was in establishing new volume. And since we were reducing prices, we did not have to consider whether they were going to have a lower price than ours or whether or not they were going to reduce, because if they did not reduce and we did, we had a competitive advantage and we were glad to have it. And we knew their price would be higher when we put the reduction in.

I simply say on these issues before dealing with some
5193 specific documents, your Honor, that that constant reitera-

tion and reiteration of phrases like "interplay of competitive markets" and "pre-determined margins of profit" and "arbitrariness" and "rigidity and stability" do not take the place of proof. And though they constantly assert that they have shown what they hope these phrases imply, all we have are normal business documents when you get down and take a look at them.

There are two or three specific issues tendered by these documents which I want to cover briefly. The first is the announcement of prices in advance. I would like your Honor to refer to this exhibit because I think it will facilitate the discussion, one situation where the prices were announced in advance, and that is Government Exhibit 462, letter of Mr. Carpenter, at page 5935. I say to the Court, first of all, this is the only instance where there was an advance announcement of these price changes and I will deal with it as such.

There were suggestions in Mr. Renninger's statement when he read other documents that brought up the question of whether this should be done again, that possibly it was done again; this is the only instance, not that there is anything improper in doing it, but we have only one instance to focus on back in 1930.

What were the factors that led to this advance announcement? They are set forth in this document. There were three distinct factors operating. First of all, duPont had a new plant coming in, the old Hickory plant, and that is mentioned in the early part of the letter as the first reason which Mr. Carpenter advances to Mr. Yerkes. He says he is clearly anxious to defer the placing of orders so that they can wait for the new plant to come in and also so that they can defer piling up of orders in advance of their ability to take care of them. That is a legitimate and proper reason to refer to announced prices in advance.

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The second is that indication of the reductions which were in prospect would stimulate further interest in cellophane on the part of users who could see that the price trend was clearly down and who then like these baking manufacturers and others that we were talking about a moment ago would be more interested in working with duPont's packaging development people and others to see if they could not put cellophane on their product.

Third, Mr. Carpenter states, "In addition it would put everyone contemplating the manufacture of cellophane in this country on very effective notice that this represented our idea of the proper price level at the present time," thereby indicating clearly to Mr. Yerkes, as these other documents do, that the duPont management was conscious that price and price policy would have necessarily competitive implications.

Consider here, your Honor, what actually happened. If these reductions had not been made, then I can see
5195 cause for the Government saying, here was an announcement of price changes put in, among other things, to frighten competitors with no intention of carrying them out. Well, that is not what the proof shows. Not only were these reductions made, if your Honor please, but in point of fact the actual reductions were in excess of those announced in advance. They were not only in excess of those announced in advance because the announcement related only to plain, your Honor, not to moistureproof, but in addition price changes were made in moistureproof though no advance announcement was made.

5196 So the actual price announcement which related to this limited future period was carried out and the prices cut more than indicated.

Now, second, after that were the prices put up? There would seem to be another place where one could argue that the Government might have some hold on if that was the case. If we had a jiggle here where the prices were knocked down to put some competitor out of business, and as soon as he was influenced by that policy the prices were raised. We didn't have that kind of situation at all. This was a discussion in 1930 and there were no price increases until after World War II, reflecting the increased cost that came with the inflation at that time. But this was no business of shaking out somebody by cutting prices down, and it is also clear here that these price reductions were clearly within proper limits, because at no time was it contemplated that the announcement would be made of prices which would take the price down below cost plus a margin for profit. This was not a monopolist cutting prices down below cost and carrying them along to shake somebody else out. This was a reduction within the permissible area of price policy, for surely a manufacturer is entitled to reduce its prices and announce that it is going to do so if it genuinely intends to do so, and if the reductions that are to be made are within permissible limits as these clearly
5197 were; and I see no reason why these should not have been made. They were consistent with the policy the company had followed prior to 1930 and which it continued to follow for the years after 1930, and the company had found, as these documents show, that with every reduction its volume increased and its profit increased, and consistent with the duPont policy of large volume and low unit profit, which is the very condition which I had assumed the anti-trust laws were designed to promote, it was announcing these price changes and it went ahead.

Now, the next issue tendered is with respect to export prices, your Honor. Great emphasis was placed upon the fact that export prices were different than domestic prices. Well, as the exhibit under discussion shows, 368, there was less than one cent a pound difference between export and domestic, one cent a pound. The return was substantially different to duPont, but the price differential was less than one cent. What was the situation that the documents disclosed? That export prices had been established at a time when duPont was particularly anxious in moving goods, that the markets to which it was selling were not well developed, as Mr. Albright says in his report; and the fact that the return was less is understandable as soon as you see from those figures in 368 that the commissions and transportation costs and all kinds of intermediate charges applicable to export business are not present in domestic business; and if in order 5198 to promote foreign business duPont thought it should sell at somewhat less than domestic business, I see nothing there that supports arbitrariness or caprice or predetermined margins of profit or the other things the Government is talking about.

The next issue is that tendered with Exhibit 323, and that is the document back in 1933 when in connection with the consideration of whether or not duPont should buy out Celon, Mr. Yerkes stated in his letter that it would be cheaper to put the prices down 10 to 20% and put Celon out of business. That thought that passed his mind in connection with this transaction was never implemented. I don't understand that the Government contends it was, and if it is to be taken as an admission that duPont had power in the cap and band business to reduce prices and drive a competitor out of business, and I suppose that is what it is offered for, I simply ask your Honor to consider the fact that that was years before the filing of the complaint and we will need something more probative and substantial than that to carry the Government's burden, because, as Mr. Minicus has so thoroughly pointed out to the Court, Celon has been a successful and flourishing enterprise.

Then, finally, there is this issue as to whether or not duPont fixed the prices of three agents or distributors, Catty, Brooks and Zellerbach. The charges that there was resale price fixing 5199 of those prices, and all I have to observe at this stage, your Honor, is that no proof has yet come forward on that issue, and none, I think, will come forward.

Mr. Minicus. At this time, your Honor, the Government will call Mr. Roy C. Cook as a witness.

Roy C. Cook, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. MINICUS. We have prepared, your Honor, in conjunction with Mr. Cook's testimony a folder of exhibits that either are presently in evidence, are marked for identification, or will be offered through Mr. Cook's testimony in order to facilitate the following of the testimony, and we have prepared within a single folder these exhibits in the order that we expect them to come forward. I also have a copy with a list for the defendant.

By Mr. MINICUS:

Q. Mr. Cook, what is your address?

A. 1731 D Street, Northeast, Washington, D. C.

Q. By whom are you employed?

A. The Department of Justice, Anti-Trust Division.

Q. What has been the tenure of your employment with the Anti-Trust Division of the Department of Justice

A. I have been employed by the Department of Justice since the summer of 1938, approximately 13 years.

5200 Q. In the interim you have been continuously employed with the Department of Justice?

A. That is correct, sir.

Q. During that 13-year period, Mr. Cook, what has been the nature of your work?

A. During that entire time I have been assigned to the Economics Section of the Anti-Trust Division to make various economic studies on problems arising in connection with the Anti-Trust enforcement laws, and those studies have covered many different industries with respect to production, prices, sales, marketing practices, and various other activities dealing with business in general.

Q. Aside from your work with the Department of Justice, have you had any other professional experience in the field of economic research?

A. I have had experience in research in connection with—after I finished school that was in the N. R. A., about two years and a half experience in the Research Division of the N. R. A.—that is, the National Recovery Administration—in connection with the proposed code; also with the National Resources Committee a year later, and with the Department of Labor, and also with the National Bituminous Coal Commission up to the summer of 1938 after I had completed the setting up of the statistical bureaus for that Commission in the far West.

Q. You mentioned, Mr. Cook, after you left school. Was 5201 your academic training in the field of economics?

A. I have had three degrees from three different universities, two of which are in the field of economics. I graduated from the University of South Carolina and also have an M. A. degree in economics from the George Washington University.

Q. What has been the specific nature of your work, Mr. Cook, in the Anti-Trust Division of the Department of Justice during the past several months?

A. During the past several months I have been devoting most of my time to a study of cellophane, also caps and bands, with particular reference to production, sales, potential capacity, and prices.

Q. Mr. Cook, I show you Government Exhibit in evidence No. 393 and ask you to refresh your recollection from that exhibit and describe it.

A. Government Exhibit 393 is a table containing the annual statistics on cellophane with the breakdown for plain and moistureproof production figures by years for the duPont Company.

Q. If I am correct, Mr. Cook, you described merely page 5476 of the exhibit?

A. All those statistics do appear on page 5476.

5202 Mr. Minicus. The Government at this time offers in evidence Government Exhibit No. 410, appearing at page 5591 of the bound volume.

Mr. Gesell. May I see what it is [Referring to Exhibit 410].

Isn't that already in evidence?

Mr. Minicus. No, there was an objection to that the last time we offered. Since then we have notified the defendant of the location of the source material—

Mr. Gesell. The record shows that was admitted in evidence, your Honor, that exhibit. All I asked for was an opportunity to check the source material, but the exhibit was admitted in evidence.

Mr. Minicus. This is an honest misunderstanding, your Honor. The Government quite obviously would not have offered it again if it had thought it in evidence.

The Court. My recollection is that it was subject to check on source material, and then nothing was ever heard of the writing after that.

By Mr. Minicus:

Q. I advert your attention, Mr. Cook, to page 5592 of Government Exhibit 410 and ask you if you are familiar with the material contained therein?

A. I am familiar with this. This contains a similar annual statistical table for the Sylvania Corporation on the
5203 production of cellophane with the breakdown as between moistureproof and plain.

Q. I show you Government Exhibit marked for identification No. 531. Did you compile that table, Mr. Cook?

A. I did compile this table, with the assistance of clerical and stenographic help under my immediate supervision.

Q. Would you inform the Court as to the sources you relied on in the compilation of that table?

A. The source is written at the bottom of the table, the duPont answer to Interrogatory No. 1 and the compilation by the American Viscose Corporation submitted February 1, 1950. Those are also identified as GX 393 and GX 410.

Q. To the best of your ability, Mr. Cook, does that table represent a true and accurate portrayal of the information you derived from those sources?

A. I believe it does represent the correct annual production of cellophane by company.

Mr. Minicus. The Government offers in evidence Government Exhibit 531 marked for identification entitled "Table 1, Annual Production of Cellophane by Company" and request that it be marked Government Exhibit 531.

Mr. Gesell. Your Honor, I rise in point of making an inquiry. In the case of some of these tables we are going to want to examine the witness on voir dire and some not. I don't know what the best procedure would be.

5204 The Court. You can do either as far as I am concerned. You can select your own procedure because you have the right to examine on voir dire, or you can make it a part of your cross-examination.

Mr. Gesell. I will so indicate when I wish to examine on voir dire. I do not as to this exhibit and I am not going to raise objections to these, except where I examine on voir dire, if your Honor please, and then if there are inaccuracies, I take it I could move to strike after the cross.

The Court. Yes, sir.

Mr. Gesell. Thank you.

(Document entitled "Table 1, Annual Production of Cellophane by Company," previously marked "Government's Exhibit 531 for Identification," was received in evidence and marked "Government's Exhibit No. 531.")

Mr. Minicus. The Government offers at this time for the Court's inspection and requests that a chart marked "Chart No. 1—Production of Cellophane by duPont and Sylvania, Years 1924 through 1947" be marked for identification Government Exhibit 550.

(Document entitled "Chart No. 1—Production of Celophane by duPont and Sylvania, Years 1924 through 1947" was marked "Government's Exhibit 550 for Identification.")

By Mr. Minicus.

Q. I show you, Mr. Cook, a photostatic copy of Govern- 5205 ment Exhibit marked for identification No. 550 and ask you if you compiled that chart?

A. I did make this chart.

Q. Would you inform the Court as to the sources or source that you relied on in the construction of that chart?

A. The source of this is Table 1 known also as GX 531.

By the Court.

Q. Is that cellophane on there?

A. That is the production of cellophane by duPont and Sylvania, as the title at the top shows.

Q. No, I mean on the chart.

A. I beg your pardon?

Q. On the chart.

A. On the chart, yes, it all relates to cellophane.

By Mr. Minicus.

Q. The Court means, Mr. Cook, did you use cellophane for that pretty red business that is on the chart?

A. I often wondered about that, your Honor. That is known as "Zipatone," and my understanding is that Zipatone is a product of cellophane. However, I am not certain of that, but I would like to know myself. I wondered about that. At least I know it is a plastic film with a sticky coating.

The Court. I didn't know whether the Government was using a substituted material.

Mr. Gesell. They are, your Honor, but we won't object.

5206 Mr. Minicus. I assure your Honor we do it at every opportunity.

The Witness. I am not sure that it is cellophane. Well, anyway, it served the purpose.

By Mr. Minicus.

Q. To the best of your ability, Mr. Cook, does that chart represent a true and accurate portrayal of the information contained in Government Exhibit 531?

A. It does.

Q. Will you kindly describe that chart to the Court, Mr. Cook?

A. This shows the relative growth of the cellophane industry by years, both moistureproof and plain combined. It shows that the industry was relatively unimportant until after the thirties. It shows an upward trend in the production until 1941 and the war years thereafter where there was somewhat a leveling off, and in 1947 the production was somewhat higher. In other words, it is the historical picture of the cellophane production in the

United States by the two producers at the present time and from the beginning of 1924, when you had only one producer, up until I believe it was 1931, when Sylvania—or the latter part of 1930, I should say—entered the field of production.

Mr. Minicus. The Government presents to the Court a chart entitled "Chart No. 2—Per Cent duPont and Sylvania 5207 Production of Cellophane is of Total, Years 1932 to 1947" and request that this chart be "marked Government Exhibit 551 for identification."

(Document entitled "Chart No. 2—Per Cent duPont and Sylvania Production of Cellophane is of Total, Years 1932 to 1947" was marked "Government's Exhibit 551 for Identification.")

Mr. Minicus. I do not recall, your Honor, I regret to state, whether I offered Chart 550 in evidence.

The Court. Not yet.

Mr. Minicus. If I did not, I hereby offer Chart 550 in evidence.

Mr. Gesell. Your Honor, may I make a statement with respect to these charts. We did not receive them until Saturday some time and it has not been possible for us to check them out to see whether they accurately reflect the tables. I am not objecting to the fact that we received them at that time or anything of that sort, but I would like to have some reservation in the record that if we find they are inaccurate in some respect, after this cross-examination is over, I can bring Mr. Cook back here to point out that if I cannot work it out with Mr. Minicus.

The Court. Let the reservation be noted.

Mr. Minicus. I don't think there will be a bit of trouble. The Government admits that it would like to have gotten these 5208 charts to defendant's counsel earlier, but it was not possible to do so, and we felt that defendant had sufficient notice of what was in the charts inasmuch as they are merely a pictorial portrayal of the tables themselves. However, we certainly would not object to any procedure that Mr. Gesell would like to adopt in that regard.

(Document entitled "Chart No. 1—Production of Cellophane by duPont and Sylvania, Years 1924 through 1947" previously marked "Government's Exhibit 550 for Identification," was received in evidence and marked "Government's Exhibit No. 550.")

By Mr. Minicus.

Q. Mr. Cook, I ask you to examine Government Exhibit for identification 551 and ask you did you construct that chart?

A. I did.

Q. What sources or source did you rely upon in the construction of that chart?

A. That is also based on Table 1 known as Exhibit GX 531, this represents the per cent duPont and Sylvania production of cellophane is of total.

Q. To the best of your ability does that chart represent a true and accurate portrayal of the information contained in Table 1, Government Exhibit 531?

A. I believe it does.

Mr. Minicus. The Government offers Exhibit 551 marked
5209 for identification in evidence and request that it be received as Government Exhibit 551.

(Document entitled "Chart No. 2—Per Cent duPont and Sylvania Production of Cellophane is of Total, Years 1932 to 1947", previously marked "Government's Exhibit 551 for Identification;" was received in evidence and marked "Government's Exhibit No. 551.")

By Mr. Minicus.

Q. Mr. Cook, will you please describe the information that Government Exhibit 551 is meant to portray?

A. This covers the period from 1932 to 1947 by years, showing the per cent duPont had of the total production of cellophane for each of those years. It also shows that the percentage which duPont had did not vary a great deal throughout that period, as indicated by the chart, all being between approximately 73 to 80 per cent of the total, as the table would show.

Q. With regard to the chart as the information is set forth in Government Exhibit 531, Table 1, Mr. Cook, what percentage of the annual production of domestic cellophane did duPont possess in the years 1924 to 1929? This information, I might point out to you is contained at the bottom of Table 1 in the tabulations. Do you have a copy of it?

A. I would have to refer to the table on that, if you have it there.

(Mr. Minicus hands Exhibit 531 to witness.)

The Witness. On Table 1, the percentage which duPont
5210 had from 1931 to 1947 of the total for all those years combined was 75.7 per cent. From 1924 to 1947, inclusive, it was 76.2 per cent. From 1944 t[illegible]947 it was 76.0 per cent.

By Mr. Minicus.

Q. I show you Government Exhibit 532, marked for identification. Did you compile that table, Mr. Cook?

A. I did.

Q. What source or sources did you rely upon in the compilation of that table?

A. This is based on GX 393 and 410.

Q. To the best of your ability does that table represent a true and accurate compilation of the information derived from those sources?

A. It does.

Mr. Minicus. The Government offers Government Exhibit 532 marked for identification in evidence and request that it be marked Government Exhibit 532.

(Document entitled "Table 2—Annual Production of Cellophane by Type" previously marked "Government's Exhibit 532 for Identification," was received in evidence and marked "Government Exhibit No. 532.")

5211 Q. Mr. Cook, will you please describe for the Court what the nature of the information is set forth in that table?

A. This exhibit gives the breakdown by years from 1924 through 1947 of plain and moistureproof cellophane of the total production produced in the United States by both companies. It shows the figures beginning in 1927 when the first production of moistureproof was recorded, being 3.9%, and increasing up through 1947 where it reached 85.2% of the total.

* * * * *

5212 Q. Mr. Cook, I draw your attention to Government Exhibit in evidence 394, with particular attention to pages 5478 through 5486. Are you familiar with the material

5213 therein contained?

A. I am generally familiar with the material in here, which is the explanation of how duPont's potential capacity was arrived at and also the statistical figures by years which are contained therein, showing the potential capacity for each of the several plants operated by the duPont Company.

Q. I draw your attention, Mr. Cook, to Government Exhibit 410 and ask you if you are familiar with that material.

A. I am familiar with that.

Q. The particular pages that I desire you to address your attention to in Government Exhibit 410, Mr. Cook, are pages 5595 through 5599. Will you kindly describe to the Court the material contained in that exhibit, Mr. Cook?

A. On page 5595 of Exhibit 410 we have the potential plant capacity of cellophane film by years for the Sylvania Industrial Corporation.

On Page 5596 we have the number of casting machines by the same company, together with the speed and size; and also on 5597 is a continuation of that.

The page marked 5598 represents an explanation relating to the potential capacity of that company.

Page 5599 represents the tabulation by years of the number of coating machines in operation of the Sylvania Industrial Corporation.

Q. Mr. Cook, I show you Government Exhibit 537, 5214 marked for identification, and ask you if you compiled that table and kindly give the title of the table.

A. I did compile this table, and the title of it is "Annual Potential Capacity Produced Cellophane By Company." The source of that is Government Exhibits 394 and 410.

Q. And is that a true and accurate representation of the information contained in those sources?

A. I believe it is.

Mr. MINICUS. The Government offers Government's Exhibit No. 537 for identification in evidence and request that it be marked "Government's Exhibit 537."

(The table entitled "Annual Potential Capacity Produced Cellophane By Company," was received in evidence and marked "Government's Exhibit No. 537.")

Q. Mr. Cook, will you kindly describe the general composition and some of the information contained in Government Exhibit No. 537?

A. This contains the potential capacity in thousands of pounds for the two producers from 1930 through 1947, inclusive, and prior thereto it shows the capacity of the duPont Company. To the right side of the table the percentages for duPont and the percentages for Sylvania Industrial Corporation are tabulated, the two percentages always adding up to 100 for the years in which both had capacity to produce. At the bottom of the table 5215 are summary figures as the years indicate and the corresponding percentages covering those years is recorded also for the two companies.

Mr. MINICUS. I show the Court a chart entitled "Chart No. 3, Location of Cellophane Plants in the United States in 1947," and request that this chart be marked "Government's Exhibit No. 552 for identification."

(The chart referred to was marked "Government's Exhibit No. 552 for identification.")

Q. Mr. Cook, did you construct this chart?

A. Yes.

Q. What sources did you rely on in the construction of this chart?

A. Well, that was based on Government Exhibits 390 and 410, and my own personal knowledge from being at the Fredericksburg plant, that that was the plant location.

Q. In addition to Government's Exhibit 410 you said you relied upon Government's Exhibit 390. Do you mean 390, Mr. Cook?

A. 394.

Q. Does this chart represent a true and accurate portrayal of the information you found existed in Government Exhibit 394 and Government Exhibit 410?

A. This is only a very, very small part of that. This is merely the location of the plants. Those exhibits contain many 5216 things besides that. I think that does represent the true location of the five cellophane plants in the United States, as the title indicates, "Location of Cellophane Plants in the United States in 1947."

Mr. Minicus. The Government offers Government exhibit marked for identification 552 in evidence and requests that it be marked "Government's Exhibit No. 552."

(The chart entitled "Location of Cellophane Plants in the United States in 1947" was received in evidence and marked "Government's Exhibit No. 552.")

Q. The description of this chart has already received some discussion, Mr. Cook. Have you anything further that you would like to add to it?

A. Nothing at all, except I think it speaks for itself, showing the geographical location of the cellophane plants in the United States.

Q. This may be clear from the chart, but I wish you would explain just which plants are which indicated on the chart.

A. The legend in the lower right hand corner of the chart gives a large dot, indicating that those are the duPont plants; the one with the star is the Sylvania plant, which is also on the chart itself.

5217 Q. I show you Government Exhibit marked for identification No. 538. Did you compile that table, Mr. Cook, and, if so, what is the title of the table?

A. I did compile this table and the title of the table is "Casting Machines in Operation Producing Cellophane by Company."

Q. What sources did you draw upon in the compilation of this table?

A. GX 394 and 410.

Q. Does that table accurately and correctly reflect the information contained in those sources, Mr. Cook?

A. I believe it does.

Mr. Minicus. I offer Government Exhibit for identification No. 538 in evidence and request that it be marked Government Exhibit 538.

(Document entitled "Table 6—Casting Machines in Operation Producing Cellophane by Company" previously marked "Government's Exhibit 538 for Identification," was received in evidence and marked "Government's Exhibit No. 538.")

By Mr. Minicus:

Q. Mr. Cook, will you once again refresh your recollection of the information contained in Government Exhibit 538 and kindly describe that information to us.

A. Table 6, marked Government Exhibit 538, contains the number of casting machines in operation by duPont and 5218 Sylvania, separately, by years, together with the percentage which each had of the total number of casting machines in operation for each of those years and also the summary figures at the bottom of the table for the number of machines for various other times as the table indicates.

It shows that from 1944 to 1947 duPont had 70.4 per cent of the total, which was somewhat less than the total percentage which they had from 1924 to '47, which was 73.9 per cent.

Mr. Minicus. I show the Court a chart entitled "Chart No. 4—Per Cent duPont's Production, Potential Capacity and Casthing Machines are of the Cellophane Industry Total, the Years of 1934 to 1947", and request that this chart be marked Government Exhibit 553 for identification.

(Document entitled "Chart No. 4—Per Cent duPont's Production, Potential Capacity and Casting Machines are of the Cellophane Industry Total, Years of 1934 to 1947" was marked "Government's Exhibit 553 for Identification.")

By Mr. Minicus:

Q. Mr. Cook, did you construct this chart?

A. I did.

Q. Upon what sources did you rely in the construction of this chart?

A. GX 531, 537 and 538.

Q. Does this chart represent a true and accurate representation of the information, the pertinent information, 5219 contained in those exhibits?

A. I believe it does.

Mr. Minicus. I offer Government Exhibit marked for identification No. 553 in evidence and request that it be marked Government Exhibit 553.

(Document entitled "Chart No. 4—Per Cent duPont's Production, Potential Capacity and Casthing Machines are of the Cellophane Industry Total, Years 1934 to 1947" previously marked "Government's Exhibit 553 for Identification" was received in evidence and Marked "Government's Exhibit No. 553.")

By Mr. Minicus:

Q. Mr. Cook, would you kindly describe this chart for us so we have a better understanding of what the lines thereon are meant to portray?

A. There are several measures of the position of a company in an industry. Three of them would be production, potential capacity, and casting machines. This chart represents the per cent duPont's production, potential capacity and casting machines are of the total in the industry by years 1934 to 1947. It shows that there is a very close relationship between all three of those measures, particularly with reference to production and potential capacity.

In the beginning, in the war years, or I should say 1943 through 1946, there is some difference to be noted between the casting machines based on the percentage of the total.

* * * * *

5221 Q. Mr. Cook, I draw your attention to Government Exhibits 182 and 182-A and ask you if you are familiar with the information contained in those two exhibits?

A. I am.

Q. Will you kindly describe that information to the Court.

A. Government Exhibit 182 contains the total imports for consumption by years of cellophane into the United States from 1934 to 1949. Government Exhibit 182-A contains total general imports by years, 1930 to 1933, inclusive, by countries of origin, the same countries of origin as given in Exhibit 182, I believe.

Q. Mr. Cook, I show you Government Exhibit 539, marked for identification, and ask you if you compiled that table?

A. I did.

Q. What is its title?

A. "Annual Production and Imports of Cellophane in Pounds."

Q. Upon what sources did you rely in the compilation of that table?

A. GX 393 and 410, and also GX 182 and 182-A.

Q. Does that table represent a true and accurate representation of the information contained in those sources?

A. I believe it does.

5222 Mr. Minicus. I offer Government Exhibit 539 marked for identification into evidence and request it be numbered Government Exhibit 539.

(Document entitled "Annual Production and Imports of Cellophane in Pounds" previously marked "Government's Exhibit 539 for Identification" was received in evidence and marked "Government's Exhibit No. 539.")

By Mr. Minicus.

Q. Would you, sir, briefly describe the information contained in that table?

A. This table contains the production by years and also the imports by years and the combination of those two. At the right-hand side it gives the per cent imports is of production and imports, showing the very small percentage which imports represents of the total supply available.

Mr. MINICUS. This diagram, your Honor, we request be marked as Government Exhibit 560 for identification. On this particular chart, your Honor, we do not have a reproduction at this time to hand up to the Court, so I request that it be held up.

(Chart entitled "Total Supply of Cellophane for Domestic consumers from Production and Imports, 1947" was marked "Government's Exhibit 560 for Identification.")

By Mr. MINICUS.

Q. Mr. Cook, did you construct this chart?

5223 A. I did.

The COURT. It is numbered what?

Mr. MINICUS. This is Chart No. 11 and we have requested that it be marked for identification as Government Exhibit 560.

By Mr. MINICUS.

Q. Upon what sources did you rely for the information portrayed thereon?

A. Government Exhibit 539, known as Table 12, which was just referred to.

Q. Is that a true and accurate representation of the information contained in Table 12?

A. I believe it is.

Mr. MINICUS. The Government offers Government Exhibit 560 for identification into evidence and requests that it be marked Government Exhibit 560.

Mr. GESELL. May I see it, please?

Mr. MINICUS. Certainly, sir.

By Mr. MINICUS.

Q. Mr. Cook, I draw your attention to the source material which you say you relied on in the compilation of that chart. At the same time I show you Government Exhibit 539 and ask you if that is the only source upon which you relied for the information contained in there or did you have recourse to other tables?

5224 A. I did have recourse to other tables which have been mentioned before, that is, the tables which contain the breakdown of the production as between duPont and Sylvania on cellophane, both moistureproof and plain. I believe that is marked as Table 1. I don't recall the exhibit number.

5225 Q. I show you Table 1, sir, and ask you if that is the table on which you also relied in construction of those figures.

A. That is correct; I also relied on Government Exhibit 531, marked Table 1 for those figures.

Q. Now, Mr. Cook, I ask you again, does this present an accurate and true copy to the best of your representation of the information contained in Charts 1 and 12?

A. It does, for the year 1947.

Mr. Minicus. On the basis of those answers, your Honor, we offer Government exhibit marked for identification No. 560 in evidence and request that it be admitted in evidence as Government's Exhibit No. 560.

(The table marked "Total Supply of Cellophane for Domestic Consumers From Production and Imports, 1947" was received in evidence and marked "Government's Exhibit No. 560.")

Q. Now, Mr. Cook, I ask you to refer to that chart and kindly explain to the Court the various elements of information that are intended to be portrayed thereby.

A. That shows that the duPont Company production of cellophane, total cellophane, amounted to about 75% of the total production plus imports. The Sylvania Corporation represented
about 25%. Imports represented less than one-tenth of one
5226 per cent of that total, being the total of production plus
imports.

Q. In your research, Mr. Cook, into the market conditions attendant upon the cellophane industry, did you find any other sources of supply to domestic purchases of cellophane other than the three sources indicated on that chart?

A. I did not. The chart should have indicated on the source there the table 1, and the corresponding exhibit number.

Mr. Minicus. Would it be satisfactory, your Honor, if before handing this chart into the Court for its records we retain it for a very brief while in order to make reproduction of it?

The Court. I don't want any extra copy.

Mr. Minicus. I presume that probably the defendant would.

The Court. You may so retain it.

By Mr. Minicus.

Q. Mr. Cook, I show you page 5488 of Government Exhibit No. 395, and ask you to refresh your recollection from the material contained therein and kindly describe it to the Court.

A. Government Exhibit 395 contains duPont's annual sales of cellophane with the breakdown as between plain and moistureproof cellophane by years.

Q. Your attention is directed, Mr. Cook, to Government Ex-
hibit 414 at page 5603, and I ask you to give the title of
5227 that exhibit and describe briefly the information contained
therein.

A. This title is "Cellophane Sales of Sylvania Industrial Corporation for Moistureproof and Plain," containing both the pounds and amounts for each of those items by years.

Q. Mr. Cook, I show you Government Exhibit 540, marked for identification, and ask you did you compile that table, and if so, what is its title?

A. I did. It contains the "Annual Dollar Sales of Cellophane By Type By Years."

Q. Upon what sources did you rely in the compilation of that information?

A. Government Exhibits No. 395 and 411.

Q. Is it a true and accurate representation of material contained in those sources?

A. It is.

Mr. Minicus. I offer Government Exhibit No. 540, marked for identification, in evidence and request that it be marked "Government's Exhibit No. 540."

(The table entitled "Annual Dollar Sales of Cellophane By Type By Years" was received in evidence and marked "Government's Exhibit No. 540.")

Q. Mr. Cook, will you kindly describe the general composition and note some of the information contained in that table?

5228 A. This table shows the actual dollar sales for each of the types of cellophane sold by all companies in the industry by years. At the right the percentage which moistureproof represents of the total is given, also the percentage which plain represents of the total. At the bottom the percentages are given showing how important the moistureproof is of the total. In 1944 to 1947 inclusive it represented 87.3% of the total.

The Court. We will take our mid-morning recess for 10 minutes.

(At this point a brief recess was taken.)

5229 Mr. Minicus. If your Honor please, just prior to the recess I had offered Government Exhibit 540 in evidence.

By Mr. Minicus.

Q. Now, Mr. Cook, I again draw your attention to Government Exhibit 540 and ask you to state what percentage of the total did moistureproof represent in sales for the year 1947?

A. 86.3 per cent of the total.

Q. And for the year 1941 what percentage of all sales was moistureproof?

A. 75.4 per cent of the total.

Q. I show you Government Exhibit No. 541 for identification and ask you if you compiled that table and if you did what is its title?

A. I did—Table 9, marked Government Exhibit 541, "Annual Dollar Sales of Cellophane by Company."

Q. Upon what sources did you rely for the information contained in that table?

A. GX 395 and 411.

Q. Is that table a true and accurate compilation of the information contained in those sources?

A. I believe it is.

Q. Would you describe in some detail, Mr. Cook, the composition and contents of that table?

A. This table shows the annual dollar sales of cellophane with the breakdown as between duPont and Sylvania for the
5230 years in which they sold cellophane. It is a total of both types of cellophane. The right-hand side of the column represents the percentages for each of the years in total sales, and at the bottom the percentage is based on the total from 1932 to 1947, 1924 to 1947, and 1944 to 1947 are given.

Q. For the four-year period, Mr. Cook, 1944 through 1947, what percentage of the total sales of all cellophane was possessed by the duPont Company?

A. 76.0 per cent.

Q. And for the years 1932 through 1947 what was the duPont percentage of total sales of all cellophane?

A. 76.0 per cent, the same as from 1944 to 1947.

Q. I invite your attention to the year 1947. In that year what percentage of the total of all cellophane sold did duPont possess?

A. 77.1 per cent.

Q. That was 1947, sir?

A. That was for the year 1947.

Q. What previous year do you find on the table, Mr. Cook, with a higher percentage than that in 1947?

A. 1934, 78.3 per cent.

Q. Now, is there any year from 1934 through 1946 in which the percentage of duPont's sales of all cellophane exceeded the percentage of 1947?

A. No.

5231 Mr. Minicus. The Government offers Government Exhibit 541 marked for identification in evidence and request that it be marked Government Exhibit 541.

(Document entitled "Annual Dollar Sales of Cellophane by Company" previously marked "Government's Exhibit 541 for Identification" was received in evidence and marked "Government's Exhibit No. 541.")

By Mr. Minicus:

Q. I show you, Mr. Cook, Government Exhibit 542 marked for identification and ask you if you compiled that table and, if so, what is its title?

A. I did. The title of this Table 10 is "Annual Dollar Sales of Moistureproof Cellophane by Company."

Q. Upon what sources did you rely for the information therein?

A. GX 395 and 411.

Q. To the best of your ability is that table a true and accurate reflection of the information contained in those sources?

A. It is.

Mr. Minicus. The Government offers Government Exhibit 542 for identification in evidence and requests that it be marked Government Exhibit 542.

(Document entitled "Annual Dollar Sales of Moistureproof Cellophane by Company" previously marked "Government's Exhibit 542 for Identification" was received in evidence and marked "Government's Exhibit No. 542.")

5232

By Mr. Minicus:

Q. Mr. Cook, I show you Government Exhibit 543 marked for identification and ask you did you compile that table and, if so, what is its title?

A. I did. The title of this is "Annual Dollar Sales of Plain Cellophane by Company."

Q. Upon what sources did you rely for the information therein?

A. GX 395 and 411.

Q. To the best of your ability does the information contained therein accurately and correctly reflect the material found in those sources?

A. It does.

Mr. Minicus. The Government offers Government Exhibit 543 marked for identification in evidence and requests that it be numbered Government Exhibit 543.

(Document entitled "Annual Dollar Sales of Plain Cellophane by Company" previously marked "Government's Exhibit 543 for Identification" was received in evidence and marked "Government's Exhibit No. 543.")

Mr. Minicus. The Government proffers the Court's inspection Chart No. 5 and requests that it be marked Government Exhibit 554 for identification.

5233 (Document entitled "Dollar Sales of Moistureproof and Plain Cellophane by Du Pont and Sylvania, Years 1932 to 1947" was marked "Government's Exhibit 554 for Identification.")

By Mr. Minicus:

Q. Mr. Cook, if you have a copy of the Chart No. 5, or Government Exhibit 554 for Identification, would you refer to it in conjunction with the two tables that have just immediately been put into evidence. Did you, Mr. Cook, construct this Chart No. 5, Government's Exhibit 554 for Identification?

A. I did.

Q. What is its title?

A. "Dollar Sales of Moistureproof and Plain Cellophane by Du Pont and Sylvania" by years, 1932 to 1947.

Q. Upon what sources did you rely in construction of this chart?

A. Tables 10 and 11, GX 542 and 543.

Q. Does this chart truly and accurately reflect the information contained in those sources?

A. I believe it does.

Mr. Minicus. The Government offers in evidence Government Exhibit 554 marked for identification and request that it be marked Government Exhibit 554.

(Document entitled "Dollar Sales of Moistureproof and Plain Cellophane by Du Pont and Sylvania, Years 1932 to 1947" previously marked "Government's Exhibit 554 for Identification" was received in evidence and marked "Government's Exhibit No. 554.") 5234

5235 Q. Mr. Cook, will you kindly interpret the information intended to be portrayed by Government's Exhibit 554 in conjunction with the two tables 542 and 543?

A. This chart shows historically from 1932 to 1947, inclusive, by years the relative importance of moistureproof and plain cellophane sales and also the corresponding quantities or, I should say, dollar sales of those two types sold by the two producers during those years. It further shows an increasing growth in the dollar sales of moistureproof in contrast to the relatively dollar sales for plain cellophane.

Q. Referring to the two tables, Mr. Cook, Tables 542 and 543, what was the percentage of duPont's moistureproof cellophane in the year 1941?

Mr. Gesell. Percentage of what?

Mr. Minicus. Percentage of total moistureproof sales.

A. In 1941 duPont produced 77.9%, or, I should say, accounted for 77.9% of the annual dollar sales of moistureproof cellophane in that year.

Q. What was that for 1942, sir?

A. For the year 1942 duPont's dollar sales of moistureproof cellophane was 72.9%.

Q. And for 1943 what was duPont's percentage?

A. 76.6%.

Q. Now, referring to the year 1941, what was duPont's
5236 percentage of plain cellophane sales of the total plain cellophane sales?

A. According to Table 12, Exhibit 543, duPont's total——

Mr. Gesell. That is Table 11.

A. (Continuing.) Table 11. According to Table 11, duPont's total of the plain cellophane was 69.0% of the total.

By Mr. Minicus:

Q. In 1942 what was that percentage?

A. For plain the duPont percentage of the total dollar sales of plain was 67.7%.

Q. Now, Mr. Cook, what was the dollar value of duPont's moistureproof sales for the year 1941?

A. $31,013,706.

Q. What was that dollar value in 1942?

A. $30,115,596.

Q. And for 1943 what was duPont's dollar value of moistureproof?

A. $34,937,420.

Q. For plain cellophane the year 1941, what was duPont's dollar value of sales of plain cellophane?

A. $8,960,865 for 1941, plain cellophane.

Q. What was it for 1942?

A. $4,535,340.

Q. And for 1943.

5237 A. $4,297,047.

Q. For 1944.

A. $5,006,154.

Q. And for 1945?

A. $4,453,135.

Mr. Minicus. The Government offers a chart entitled "Chart No. 6, Percent duPont and Sylvania Dollar Sales of Plain and Moistureproof Cellophane Is of the Total," and we request this chart be marked "Government's Exhibit No. 555 for identification."

(The chart referred to was marked "Government's Exhibit No. 555 for identification.")

Q. Mr. Cook, did you construct Chart No. 6, Government's Exhibit No. 555, marked for identification?

A. I did.

Q. Upon what sources did you rely for the information portrayed thereon?

A. GX 542 and 543.

Q. Does Chart No. 6, Government's Exhibit No. 555 for identification, accurately and truly portray the information found in those two sources?

A. It does.

Mr. Minicus. I offer Government's Exhibit No. 555 for identification in evidence and request that it be marked "Government's Exhibit No. 555."

5238 (Chart No. 6, entitled "Percent duPont and Sylvania Dollar Sales of Plain and Moistureproof Cellophane Is of the Total" was received in evidence and marked "Government's Exhibit No. 555.")

Q. Mr. Cook, will you describe what is intended to be portrayed factually on Government Exhibit No. 555?

A. The position of duPont and Sylvania as measured by dollar sales of both plain and moistureproof cellophane by years.

Q. I again show you Government's Exhibits 542 and 543. For the year 1947, Mr. Cook, of the entire moistureproof sales of domestic cellophane what percentage did the duPont Company have?

A. 76.8%.

Q. And for plain cellophane?

A. 78.7%.

Q. For the year 1946, Mr. Cook, what percentage of the total sales of moistureproof cellophane produced domestically did the duPont Company have?

A. 75.5%.

Q. And for plain cellophane?

A. 71.0%.

Q. And for the year 1945, Mr. Cook, what percentage of total moistureproof sales did the duPont Company possess?

A. 77.1%.

5239 Q. And for plain cellophane in the same year?

A. 71.4%.

Q. And for 1944, Mr. Cook, what percentage of total sales of domestically produced cellophane was possessed by the duPont Company?

A. These show which type. Which type do you refer to?

Q. The year 1944, moistureproof cellophane.

A. Moistureproof? 76.3%.

Q. And for plain cellophane for that year?

A. 77.7%.

* * * * *

5240 Mr. Minicus. The Government offers up a chart No. 12 entitled "Position of duPont in Cellophane, 1944 to 1947" and request that this chart be numbered Government Exhibit

561 for Identification. This is the other occasion, your Honor, in which we have been unable to duplicate the chart, so we would like to have it held up while Mr. Cook testifies from it.

(Document entitled "Position of duPont in Cellophane,
5241 1944 to 1947" was marked "Government's Exhibit 561 for Identification.")

By Mr. MINICUS.

Q. Mr. Cook, did you construct that chart?

A. I did.

Q. Upon what sources did you rely for the construction of that chart?

A. Tables 1, 3, 4, 9, 5, and 6, which have been referred to, I believe, in my previous testimony, the tables covering production of cellophane, production of moistureproof——

Q. Pardon me, Mr. Cook. Will you return the chart to Mr. Ford and will you step down and face the chart and point to what you are describing; then the Court and Mr. Gesell will be able to see just what you are indicating.

A. The production of moistureproof cellophane, the production of plain cellophane, the dollar sales, the potential capacity and the number of casting machines—all of those exhibits previously referred to in my testimony. That is for the years 1944 to 1947.

Q. Does this chart represent a true and accurate representation of the information contained in those sources?

A. I believe it does.

Mr. MINICUS. The Government offers this chart in evidence and requests that it be marked Government Exhibit 561.

(Document entitled "Position of duPont in Cellophane
5242 1944 to 1947" previously marked "Government's Exhibit 561 for identification" was received in evidence and marked "Government's Exhibit 561.")

By Mr. MINICUS.

Q. Now, Mr. Cook, I am going to ask you to describe this chart in some detail and I would appreciate it if you could indicate by pointing just what particular material you have under discussion in relation to the chart.

A. All the bars cover the years 1944 to 1947, inclusive. I should say also that all the bars are percentages, one hundred per cent being the top and zero at the bottom.

The first bar on the left is the production of cellophane which has been previously testified by me. This shows that the position of duPont as measured by that is about 76 per cent of the total. The balance of the bar is Sylvania's production, percentagewise, of cellophane. That includes both types of cellophane.

The next bar is the moistureproof production of cellophane as measured by the percentages of the total. There again it shows the position of duPont is slightly higher than in the case of total cellophane.

The third bar covers the production of plain cellophane using the same measures. It shows that the percentage which duPont has is slightly less than what it has of the total production of 5242 cellophane and somewhat less than it has of the total production of moistureproof cellophane.

The fourth bar would represent the measure on the basis of dollar sales if cellophane. There again the percentage is somewhat higher than 75 per cent—I believe about 76 per cent.

Another measure of the position of duPont in the industry for the years as indicated would be on the potential capacity to produce cellophane. That again is not very different from the percentages of production, sales, the production of moistureproof, and the production of plain—that is, the level of all of those is about the same.

The last bar on the right is based on the number of casting machines. That is somewhat lower for the duPont Company, being slightly more than 70 per cent. The tables of course supporting this chart would reveal the exact percentages of each in each instance at the summary portion. The only reason for that is probably that indicates the difference in speed or the types of cellophane produced. So other than the number of casting machines there is a very close relationship as measured by these, by the severeal machines, for the cellophane industry.

Mr. Minicus. We would appreciate, your Honor, the opportunity to retain this chart for a very short period of time also for the purposes of reproduction.

* * * * * *

5280 By Mr. Minicus.

Q. Mr. Cook, I show you Government Exhibit 546-B for identification and ask you did you compile that table?

A. I did from the sources indicated.

Q. What are the sources indicated on that?

A. Government Exhibits 491, 494, 495 and 495-A.

Q. To the best of your ability, Mr. Cook, does this table actually and truly reflect the information to be found in the sources that you have just indicated you relied on for this table?

A. It covers the two things as indicated by the table. It is correct as the table purports to be. There are other things in the tables which do not have any special bearing on that.

Mr. Minicus. The Government offers Government's Exhibit

No. 546–B for identification in evidence and requests that it be marked "Government's Exhibit No. 546–B."

(The table headed "Mill Costs Plus Selling Expenses of duPont Plain and Moistureproof Cellophane" was received in evidence and marked "Government's Exhibit No. 546–B.")

Q. Mr. Cook, will you kindly describe the contents of Government's Exhibit 546–B, please?

A. This table shows by years the mill costs plus selling expenses of duPont plain and moistureproof cellophane broken down
5281 separately, one column for plain and the second column for moistureproof in dollars per pound.

Mr. Minicus. I have been advised by my associates, your Honor, that in the routine of laying the foundation for certain of the Government's exhibits two of them were not moved into evidence. They are Government's Exhibits 536 and 553. The witness has testified to the foundation questions necessary to qualify them, and I therefore now move them into evidence.

The Court. Are those charts 6 and 7?

Mr. Minicus. That is Chart 4 or Government's Exhibit 553, and the other is the caps table, Government's Exhibit No. 536.

The Court. Yes.

(The caps table was received in evidence and marked "Government's Exhibit No. 536.")

(Chart No. 4 was received in evidence and marked "Government's Exhibit No. 553.")

Mr. Minicus. At this time Mr. Renninger has a few questions that he would like to address to the witness relative to prices.

Mr. Gesell. He is still on direct, isn't he, your Honor?

The Court. I presume so.

Mr. Gesell wants to be sure he has not had taken from him the right of cross-examination of the witness. This is all part of the direct?

5282 Mr. Minicus. Most certainly, your Honor.

By Mr. Renninger.

Q. Mr. Cook, during the course of your study of cellophane did you examine the price lists?

A. I did.

Q. What was the nature of that price study?

A. I took the cellophane price lists of duPont and Sylvania for the large quantities which were made available to me and undertook to compare them to see to what extent they were uniform as to time and amount for the various types of cellophane sold by the company, and as recorded on the price lists.

Q. I show you Government Exhibit No. 549, marked for identification, and ask you if that was prepared by you.

A. It was.

~~Mr.~~ Renninger. If your Honor please, do you have a copy of that?

Q. Please describe how you prepared these tables?

A. This is a series of tables entitled "Comparison of Cellophane Prices duPont and Sylvania In Effect From February 1, 1930 to December 31, 1946," as contained in their published price lists. I took the first price list for which there was both a duPont and Sylvania list. That was February 1, 1930, and I took the first classification that I found in the duPont price list called No. 300 5283 plain transparent cut-to-size sheets cellophane—

Q. Just a minute, Mr. Cook.

Mr. Renninger. If your Honor please, for your Honor's information, in case you wanted to follow, here is the first price list.

The Court. Yes.

Q. Continue, Mr. Cook.

A. The 7,000,000 minimum quantity square inches. It is to be noted that there are many different types of cellophane and different quantities, each one bearing a different price. So I undertook to take the same classification of the price and follow that right through the entire price list starting with February 1, 1930. The next price list which I found was May 26, 1930. The next one was August 1, 1930, et cetera.

Then I copied down the price which seemed to be comparative for that particular classification that would fall under the heading at the top of each table, and I followed through through November 1, 1941, and I noticed that the next price list was dated, I believe, January 1, 1947. So that brought the series through 1946.

Now, after I had completed copying the duPont prices from the price lists, I then took the Sylvania price lists, all of them, and copied their effective dates down side by side with the 5284 duPont prices in order to see whether or not the prices as published in the price lists there varied as to amount and time.

The same principle was followed for the other quantities and types and classifications of cellophane, about a total of 38 in all. I undertook to include every different category of cellophane which was recorded on the price lists issued by those companies during that time.

5285 Q. What do these tables purport to show?

A. They show the effective date for both Du Pont and Sylvania for the price lists and the corresponding price for each of those companies as reported in the price lists for those particular classifications as described in the heading above each table.

Q. What differences did you note relative to the effective date of the price lists?

A. I don't recall any differences in the effective dates from February 1, 1930 to the end of 1946.

Q. What differences did you find in the prices as contained therein of each type?

A. I find some slight differences in price in 1941, that is, the price list dated November 1, 1941, which is indicated on the tables in question. This is usually a figure approximately one per cent. It is to be noted that the figure is carried out one place more and there are slight differences where there are prices in 1941—I believe that in all instances where the two companies do have prices there is a slight difference in that year, as indicated on the table. In some instances there are no differences, particularly in the case of rolls and sheets, some of the sheets. I would have to go through each table to check. But that can be determined by looking at the bottom of each table to see which ones are different. Those are only minor differences.

5286 Q. Mr. Cook, I don't know whether I correctly understood you. Did you say that there were or were not differences in the prices on rolls?

A. I think I can go through the whole thing. On page 1 there is a slight difference——

Mr. Gesell: Well, now, your Honor, I don't mind this testimony but the exhibit has not been offered in evidence and I take it it speaks for itself, if he is going to offer it. The witness is testifying about the contents.

By Mr. Renninger:

Q. Do you believe that these tabulations represent an accurate comparison of the cellophane prices as contained in the Du Pont and Sylvania published price lists in effect from February 1, 1930 to December 31, 1946?

A. I believe they do.

Mr. Renninger. I offer in evidence Government Exhibit 549.

Mr. Gesell. What was the last date, Mr. Renninger, that this list covers?

Mr. Renninger. Through December 31, 1946.

(Document entitled "Comparison of Cellophane Prices of Du Pont and Sylvania in effect from February 1, 1930 to December 31, 1946 as contained in their Published Price Lists" previously marked "Government's Exhibit 549 for Identification" was received in evidence and marked "Government's Exhibit
5287 No. 549.")

* * * * * * *

5297 Wednesday, April 18, 1951, 10:30 O'Clock A. M.

Present: As before noted.

Roy C. Cook (resumed).

Mr. Minicus. We have no further questions of the witness on direct examination, your Honor.

Mr. Gesell. I gather that means, Mr. Minicus, you are not going to put in these other charts and tables?

Mr. Minicus. That is correct, Mr. Gesell.

Cross-examination by Mr. Gesell:

Q. Mr. Cook, have you got your Exhibit 549 in front of you, the comparison of du Pont and Sylvania prices?

A. Yes, I do.

Q. Why did you choose, Mr. Cook, these particular types of cellophane for the purposes of this presentation?

A. Mr. Gesell, I didn't choose them. I took the prices as they appeared in the price lists.

Q. Well, you knew, didn't you, from your three-months study of the market and the prices that the most important cellophane items being sold are not on those price lists?

A. I noticed that moistureproof and several types of moistureproof, which is the most important type, prices for
5298 that were included on the price lists. I did not undertake to make a separate study as to how much was sold of each price, that is true.

The Court. Mr. Gesell, I don't know whether the witness understands what are important items of cellophane or not. But certainly I don't know what they are. So would you lay a background so I will be able to follow your cross-examination?

Mr. Gesell. Yes, I was coming along to that, your Honor.

Q. You say that M. T. cellophane, moistureproof cellophane, is in your opinion the most important type?

A. Unquestionably moistureproof cellophane is the most important in 1947.

The Court. Why do they use that designation "M. T."? I have heard it all through the trial.

Mr. Gesell. "M. T." is the code designation for moistureproof transparent film.

Q. You say that is the most important, do you, Mr. Cook?

A. In 1947 moistureproof was the most important of all types.

Q. What do you mean most important?

A. There are two types of cellophane sold, plain and moistureproof. Moistureproof is by far the most important,
5299 or it was in 1947.

Q. What do you mean most important?

A. I mean by that most of it is produced and sold.

Q. You mean larger sales in volume?

A. That is right, probably 85%.

Q. You say that is true of M. T. film?

A. I refer to it as moistureproof and plain.

Q. Show me on your schedule where you compare the prices for that particular type of film?

A. Pages 16, 17, 18, 29, 30, 37, and 38, and there are, I think, some comparisons on No. 450, moistureproof, which were given only for about three years, as I recall it, and which those prices were also—

Q. The only two of those sheets that relate to moistureproof transparent cellophane rolls are 37 and 38, are they not?

A. That is correct.

Q. Those price comparisons on those pages 37 and 38 are the prices for M. T. cellophane as shown on the price schedules; isn't that right?

A. That is correct; that is moistureproof cellophane as quoted on the price lists.

Q. The M. T. type as shown on the price schedules?

A. Sometimes it was referred to as M. T., sometimes just moistureproof No. 300.

Q. In rolls?

5300 A. In rolls.

Q. And you say that from your study that that is the most important type of cellophane being sold?

A. I have no statistics on this, but it is my understanding that in 1946 and other years along there that No. 300 was one of the most important types of moistureproof sold. Again I say I have not made a study and I did not have the statistics available to make a weighted average of all these to show the relative importance of each.

Q. Didn't you have in front of you Exhibit 396 in this case?

A. I had only the price lists available. The purpose of this study, as I have already testified to you, represents a comparison of the prices contained in the price lists. It does not purport to go beyond that. It only purports to show what the effective dates of the price lists were and what the corresponding prices were for the different types of cellophane common to both companies and recorded therein.

Q. Now, I will ask you the question again because you have not answered it. Did you have in front of you in connection with your studies Exhibit 396, the answers to the interrogatories?

A. My answer is—I will have to see that, but I do not believe I had anything besides the price lists when I was making this up.

5301 Q. You mean that in the three months that you have been studying prices and market conditions you have not read duPont's answers to the interrogatories?

A. Which answer are you referring to?

Q. Exhibit 396.

A. I will have to see 396.

Q. Take a look at 396.

A. Would you hand me 396.

Q. That is page 5495 of Exhibit 396.

(Clerk hands witness Exhibit 396.)

Q. Isn't that part of the same exhibit that you testified Monday on many occasions you had relied upon in preparing various of your exhibits?

A. I have never prepared any exhibits on this. I have seen this exhibit before. I have never prepared any tables in connection with it.

Q. But you had this before you, didn't you? You knew about this in connection with your studies? That is all I am asking you.

A. I did.

Q. Now, if you look on that page 5495, does it not show that the 300 MST films were far more important in terms of the volume of sales and business done than the MT films which you said were the most important?

Mr. Minikus. Objection to that question. There is specific time pointed out in the question, your Honor.

5302 The Court. Reframe the question.

By Mr. Gesell.

Q. Take a look at 1946. That is the year you were talking about with me a minute ago and I thought we understood it.

A. Now, I will be glad to read the figures from here——

Q. I don't want you to read——

A. What is your question, please?

Q. Was there not more MST film sold in 1946 than MT film?

A. Well, it seems to me—and I have not looked at this for several months—it seems to me that according to the heading, all of this is MST 300.

Q. Don't you see a heading, MT? That is the one you compared, isn't it, MT?

A. I did not compare MT or MST. I only compared what the price lists contained.

Q. And didn't the price lists contain the price for 300 MT?

A. Whatever the price lists said, that is what I compared.

Q. That does not answer my question at all.

A. I would have to look at the price lists.

Q. Take a look.

A. All right. Now we will take the first price list that I used——

Q. Let's take 1946. That is the year we are talking about.

5303 A. Now then, do you have the exhibit for the price list?

Q. Don't you have the papers you relied on? Don't you have your work papers there? Take a look at your work papers.

A. I have in front of me price list effective November 1, 1941, of the duPont——

Q. Didn't you take the MT price?

A. I took the 300 Moistureproof Transparent, if that is what MT means, and I assume it does.

Q. That is 41 cents, isn't it?

A. That is correct.

Q. Where on your schedule do you show the MST prices?

A. Referring to GX 549?

Q. Yes.

A. I don't show it. I could not go beyond the price lists.

Q. Well, take a look at 1947. You have got those before you, haven't you?

A. This study was made through 1946.

Q. But I am asking you to look at 1947.

Mr. Minicus. Objection to that, your Honor. It goes beyond the direct examination. The study specifically only goes through 1946. I don't see how he can question him on 1947. I don't think anything in 1947 will impeach his study which is specifically limited to 1946.

The Court. Nevertheless I think the field of inquiry 5304 has been opened by the direct examination.

Mr. Minicus. That may be true, your Honor, but on the direct examination we conceded that the prices were different in 1947.

Mr. Gesell. Well, if Mr. Minicus will concede that all the cellophane prices charged by Du Pont and Sylvania were different in the year 1947 as to all major types of cellophane sold by the two companies and he will make that concession, it will limit some of this examination.

Mr. Minicus. We do not make that concession, your Honor. We state that the price identity was not as comparable in 1947 as it had been in prior years.

Mr. Gesell. Either it was comparable or it was not.

Mr. Minicus. But if Mr. Gesell is attempting to impeach this exhibit, your Honor, I think his cross-examination should be limited to the exhibit itself. If he wants to go beyond that, outside of the exhibit, and question about 1947, we have no objection, but this exhibit has been expressly stated to terminate at the end of 1946, and the 1947 price lists I don't think can be used to impeach it.

Mr. Gesell. If he will watch the development of the examination, your Honor, perhaps he will see how it does.

The Court. Very well. You may proceed, Mr. Gesell.

5305 A. I have in front of me now a price list dated January 1, 1947, entitled "duPont price list—Cellophane."

By Mr. Gesell:

Q. Doesn't that show separate prices for M. T., M. S. T., M. A. T., and other different 306 types?

A. That does show it.

Q. Now, will you also get out the Sylvania list?

A. I have before me a Sylvania list effective January 22, 1947, No. 17.

Q. Take a look at the one dated June 1, 1947.

A. I don't have that.

Q. Didn't you know there was a Sylvania price list dated June 1, 1947?

A. I am sorry I don't have it. I did understand that there was one. However, my study was not made in that because I found a report already made, Government Exhibit 480, which covered the price comparison between duPont and Sylvania for the entire year 1947. Therefore I have made no study of prices for 1947 and it did not seem, also, that the prices were comparable as to form—that is, the price lists themselves. For instance, there would be 300 M. S. T.; they would have an exception 56 and 57. But anyway I didn't make a study for 1947 because that analysis was made in Government Exhibit 480.

Q. You didn't find comparable studies to 480 for
5306 earlier years?

A. None that I recall, Mr. Gesell, on the complete price uniformity for the entire period.

Q. Did you determine to cut this off at the end of 1946 or were you told to cut it off at the end of 1946?

A. I was not told to cut it off at the end of 1946.

Q. You decided yourself?

A. I decided myself that that was the only fair way to make a study which would show the limited thing of the price uniformity as to amount and date for the kinds of cellophane listed on the price lists.

Q. In other words, to exclude the period where there was a lack of uniformity?

A. The price lists varied as to form between 1947 and earlier years, and I did not have the technical ability to find out what all the designations were to make it on an entirely comparable basis.

Q. And you are not able, therefore, to tell me whether your comparison includes 10%, 20%, 30%, 40%, or any particular percentage of the business of duPont and Sylvania?

A. Not from an exact statistical study. However, in reading the documents my clear understanding is that most of the cellophane sold by these companies would be included in the price lists; that is, at least it would be based on the price lists.

5307 Q. So that even though you have had page 5495 of this exhibit called to your attention, which shows that not to be the case, you still say that is your impression from the documents as a whole?

A. That is right.

Mr. MINICUS. I still object to the use of that exhibit in reference to this study, your Honor. Those prices and those types of cellophane were separately listed at a time after this study terminates.

Mr. GESELL. That is exactly the point, that the important types were not listed on the schedules.

By Mr. GESELL:

Q. You found no M. S. A. T. on the schedules, did you, in the period you studied?

A. Mr. Gesell, I have tried to make it as clear as I can that this study was limited to the prices contained on the price lists.

Q. I am asking you did you find any M. S. A. T.?

A. Now, which price list are you referring to?

Q. Any time. Does your comparison cover M. S. A. T.?

Mr. MINICUS. There is no proper foundation for that, your Honor. Mr. Gesell has not shown that M. S. A. T. appears on any price list.

Mr. GESELL. I am trying to show it does not.

A. I don't recall any what you refer to as M——

5308 Q. M. S. A. T.

A. M. S. A. T. on any of the price lists. My best recollection is that it is entitled "Moistureproof Transparent."

Q. That is a different type of film, isn't it?

A. I will have to take your word for it.

Q. You don't know whether it is or not?

A. I believe it is a different one. I won't question it if you say it is. I did make a study of the average prices between duPont and Sylvania for the year 1947, and I found that they were virtually identical, which was another reason suggesting that there was not too much difference in the prices, even though I could not compare them with respect to each particular type on a uniform basis.

Q. You didn't make any comparison of band prices, did you?

A. I made some preliminary check on band prices, but not a complete study on band prices or cap prices, either.

Q. Why didn't you study cap and band prices?

A. Well, I thought that cellophane was more important, and my records were incomplete, and I wanted to make a complete study. I did undertake to make such a preliminary study and I found that where they had the same sizes there was identity, for instance, in 1930.

Q. Are you talking about bands or are you talking about caps?

5309 A. I had in mind caps. The first comparison I made on bands was somewhat later, I believe about 1935, somewhere along there.

Q. Did you make any comparison of export prices?

A. No, I did not.

Q. Did you make any comparison of jobber prices?

A. No; the only thing I did about jobber prices was I had one jobber price furnished to me which I used in making up this list, and later another price bearing the same date was substituted, and I compared the items in common to see if there was any difference, and I didn't find any differences.

Q. But you made no study of jobber prices?

A. I made no study of jobber prices as such, because my understanding was based on reading the records that the jobber prices were based on the same price list; in other words, it was a discount from the price list. So I didn't make any separate study of prices to jobbers.

Q. Now, on all of these schedules you carry the words "effective date." You don't mean to imply by that, do you, that the price list issued on that date?

A. I would have to be sure that I understood what you mean by "issued". If you mean printed or when it was compiled, I don't know; but I don't know anymore than what the price list says. That may answer your question.

5310 Q. Did you make any study of Sylvania's costs?

A. No, I did not make any study of Sylvania's costs. I did have access to those books, but I did not make any study of that.

Q. Take a look at Exhibit 551 of your schedules.

A. I am sorry, I don't know which one that is.

Q. That is Chart No. 2.

A. Yes, I have it.

Q. What is included in that chart under the term "Cellophane"?

A. Chart No. 2?

Q. Yes.

A. That would be only cellophane; that would be moistureproof and plain cellophane.

Q. And not caps and bands?

A. It does not include caps and bands.

Q. Why didn't you include caps and bands?

A. Because there was a separate chart for caps and bands.

Q. Aren't they cellophane?

A. Well, I don't consider that caps and bands is cellophane. It is a different product, and I think it would be entirely misleading to add caps and bands and cellophane.

Q. You say they are a separate product because they don't compete?

5311 A. Well, they are used for different purposes; they are different forms. It is true they are made of the same raw materials, but they are for different uses than cellophane.

Q. I noticed in your schedules that you also treated caps differently from bands.

A. That is right.

Q. Was that for the same reason, that they are different products?

A. I thought there might be a distinction between caps and bands.

Q. Did your market studies indicate that there was no competition between a cap and a band?

A. I didn't go into the competition between caps and bands.

Q. Why didn't you lump them together? Why did you break them separately?

A. Because I considered it a better statistical procedure to keep them separate, Mr. Gesell.

Q. Even if they were sold for the same purpose to the same people?

Mr. Minicus. Objection. There is nothing in the record to show that they were sold for the same purpose to the same people.

Mr. Gesell. He said he thought they didn't compete. I am testing his knowledge of that.

5312 The Witness. I don't contend that caps or bands do not compete with each other.

By Mr. Gesell:

Q. You recognize they do?

A. They probably do.

Q. Yet you treated them separately?

A. That is right. There is a difference, though, between a band and a cap. Many of the users could only use caps. Many of the users could only use bands.

Q. Isn't that true also as to plain and moistureproof which you have lumped in Chart No. 2? Only some users would use plain and only some would use moistureproof and yet you lumped them in Chart No. 2.

A. That is very true. This is a summary chart to show, as the heading indicates, total cellophane.

Q. Total plain and total moistureproof?

A. That is right. I have the breakdown as between the other types, Mr. Gesell. I have prepared other tables.

Q. I was talking about this chart.

A. Well, I can only answer that adequately by telling you that I have prepared a breakdown on the basis of moistureproof separately and a comparison on the basis of plain separately.

Q. You have not any lump of caps and bands such as you have of moistureproof and plain, have you?

A. No, I did not add caps and bands into cellophane.

Q. Why did you start this chart at 1932 when the schedule
5313 it purported to reflect did not start at that date? You
said it correctly reflected the schedule but in point of fact it does not, does it?

A. There was some uncertainty as to the production figures, that is, the reliability of the production figures in the earlier year.

Q. Is that indicated on the table, that you are uncertain about those production figures?

A. This chart is based entirely on the table, Table 1.

Q. Does Table 1 indicate you have uncertainty about the figures prior to 1932?

A. I have a footnote where I say that they were not available for——

Q. 1930?

A. 1930, and the company was just getting into production.

Q. What about 1931, Mr. Cook? Did you indicate any uncertainty about the figures as to 1931?

A. The chart I thought was large enough as it was to cover those years, and Sylvania was not an important factor until about 1932.

Q. If you had put 1931 in, it would have sort of thrown out of balance the neat picture you are trying to draw in Chart No. 2, wouldn't it?

A. I don't believe it would.

Q. Wasn't the percentage quite different in 1931?

5314 A. I will have to look at the table and see. I don't think
there was a great deal of difference (examining chart). In 1931 the per cent of the total for Du Pont was much higher, and I wanted to present a much fairer picture because I did not feel that it was fair to Du Pont to show an unusually high figure for 1931.

Q. You didn't think it was fair to show——

A. I didn't think it would be a fair presentation, Mr. Gesell, to show a high figure because if you compare the figures of Sylvania, there were only 3,000,000 pounds in 1931 and the next year it was twice that. So I did not think that was truly representative to put on a chart. However, to make the table complete, I did include it.

Q. What did you think was unfair to Du Pont about showing that a new competitior could come into the business and take a substantial amount of business away from Du Pont?

A. Well, I don't notice that the figures have changed very much.

Q. Didn't they change substantially in the year you missed on your chart?

A. No, I would say not.

Q. You don't consider a change from 13.2 to 20.7 a substantial percentage change?

A. I don't consider that—1931 to 1947 the figure——

5315 Q. I am talking about 1931, Mr. Cook, and you know I am, and in 1932, and the change was from 13.2 to 20.7, wasn't it?

A. I am going to say——

Q. I want you to answer my question.

A. I can't change the figures, and I am not trying to. The figure for Du Pont based on these early figures was 86.8 per cent. The figures for the entire period, including 1931 through 1947, was 75.7 per cent, based on all those years, including 1931, which is only a very, very small part of the total of 392,000,000. In other words, the 86.6 per cent should be considered in a weighted sense and compared to the 392,000,000 for the entire period, or for any other year during the period. For example, 1947 it was 41,000,000, which is about fifteen times as much at it was then. So I think you have to consider the weighted figure there.

Q. Do you think it was fair to Du Pont on that Exhibit 531 to compare the percentages as you have for the period 1924 to 1947 when you included for Du Pont an entire year's production and did not include Sylvania's production for that year? Was that in an effort to be fair to Du Pont?

A. I had no way of separating those figures. I did undertake to look at the original records to see if I could get those figures. All I could do was to put a footnote there, and I did know that the production started in the latter part of 1930, and I also knew from other statistics which had been furnished to me that that production was very slight.

5316 Q. But you nonetheless in all these schedules have taken the period '24 to '47 as one of your groupings when it has that distortion in it, haven't you?

A. That is a very, very minor limitation on the statistics, as you can see from other statistics furnished on the number of machines and other things. It could only be a very small figure.

Q. What is it that you say your Chart No. 2 shows?

A. Chart No. 2 would show by years the position of Du Pont in the production of cellophane, both types, moistureproof and plain, as measured on a percentage basis.

Q. And is it your purpose by this chart to show that that percentage was stable, relatively stable?

A. My purpose is to show the facts as they are, Mr. Gesell. That is what it shows. But I had no purpose in mind when I compiled this chart other than to put the facts in as they are.

Q. So that you draw the inference as an expert from this chart that the percentage growth of these two companies has been comparable throughout this period and stable, is that right?

A. I don't consider you have to be an expert to draw that inference. It is clearly apparent from the chart.

Q. Will you answer my question. Is that what you do?

A. That is the conclusion which I would draw from the
5317 chart.

Q. Well now, Mr. Cook, don't you know from your studies that in fact the rate of growth of these two companies has been different in every year over this period, and substantially different?

A. I do not know that.

Q. Well, will you take a look then at your exhibit and we will go through it together, Exhibit 531. It is the table that supports Chart 2.

A. May I have the question again, please.

Q. Have you got the table in front of you?

A. I have Table 1, Government Exhibit 531.

Q. I understand your testimony to be that you say you do not realize that the rate of growth of these two companies has differed in every year. Isn't that what you testified?

A. No, I don't recall that. They have both grown in production from year to year, not by exactly the same amount, it is true. I have prepared a chart which would better show this. Even by looking at the table the rate of growth is not identical, but it does follow some general pattern.

Q. That is what I was trying to develop. Now, what is the general pattern that it follows?

A. The upward trend in the growth. One is that the production of cellophane is generally, not for all years, but generally
upward.

5318 Q. Yes, but isn't it true from that table—you take a look
at it now as I go down it—that in '33, '34, '35, '38, '39, '41, '45 and '46 Sylvania had a greater rate of growth than Du Pont?

A. I don't believe that it would be very different——

Q. Will you compute it out now? Take the years——

A. If it were different there would be a great deal of difference between the percentages. If you will notice the percentages in the column, that is, either take the Du Pont percentages or the Sylvania percentages, you will not notice too much difference between those percentages for any year, and if the rate of growth were a great deal different, that would definitely be reflected in those percentages.

Q. Well now, let's see if that is the case because my figures don't show that is the case at all, Mr. Cook. What was the rate of growth from 1932 to 1933 of Du Pont as you see it there?

A. The production of Du Pont was 27,008,687 pounds in 1932, and the next year, 1933, it increased to 33,962,048.

Q. That is about 20 per cent, isn't it?

A. That would be about 20 per cent.

Q. Now, what was Sylvania's growth?

A. That would be about——

Q. 34 per cent?

A. From '32 to——

5319 Q. To '33, in the same period.

A. That would be about——

Q. 34 per cent, wouldn't it?

A. It would be closer to 20 percent. However, I am not too good at dividing figures. It looks to me like it would be much closer to 20 percent. In other words, the growth would be about the same.

Mr. Gesell. Now, your Honor, I have a problem here in the examination of the witness. I want these percentages computed out. Can we take him off the stand and have him compute them and then come back after lunch and go on with this, whatever your pleasure is?

The Court. Whatever the witness' convenience is, whatever he prefers to do.

Mr. Gesell. I want the rates computed for the period.

The Witness. If you want me to compute the percentages, I will be very happy to do it.

Mr. Minicus. I don't know what evidence we have put in concerning the rate of growth of the two companies. We have put in evidence to show their proportionate participation in the market year after year was practically the same.

The Court. The point is, I do not see that you are required to do it, but if you want to do it——

The Witness. I can only answer it this way. If I can have a machine made available to me, I think I could make

5320 all those computations in about 15 minutes.

The Court. My suggestion is this, that some time during the recess or the luncheon period that you make a list of the percentages you want, Mr. Gesell, and the witness says he will attempt——

The WITNESS. I don't have a machine. If I can get a machine, I could make all of them in 15 or 20 minutes.

Mr. GESELL. I can make up the list and have him check it, and I will leave this point now.

The COURT. Very well.

Mr. GESELL. Mr. Minicus' comment has served to emphasize the point of my examination, that there has been no effort here to show rates of growth.

The COURT. Well, I do not suppose he considered that part of his case.

Mr. GESELL. I guess he didn't.

Mr. MINICUS. I still don't consider it part of my case.

Mr. GESELL. Another significant concession, your Honor.

By Mr. GESELL:

Q. You have not any comparison here, have you, Mr. Cook, of casting machine speeds?

A. No, I don't have that, only insofar as it is related to production and number of machines. I have a graph which would tend to show something on that question.

Annual rate of growth of Cellophane Production

	Du Pont [1]		Sylvania [2]	
	Production pounds	Percent increase over previous year	Production pounds	Percent increase over previous year
1924	361, 249			
1925	944, 441	161. 4		
1926	1, 910, 286	102. 2		
1927	1, 889, 599	−1. 1		
1928	3, 181, 069	68. 3		
1929	6, 056, 128	90. 4		
1930	14, 804, 941	144. 5	N. A.	
1931	24, 619, 988	66. 3	3, 751, 151	
1932	27, 008, 687	9. 7	7, 032, 089	87. 5
1933	33, 962, 048	25. 7	8, 366, 602	19. 0
1934	39, 357, 997	15. 9	11, 212, 407	34. 0
1935	43, 807, 451	11. 3	13, 788, 529	23. 0
1936	55, 593, 780	26. 9	19, 999, 655	45. 0
1937	61, 021, 870	9. 8	20, 690, 482	3. 5
1938	61, 386, 582	0. 6	21, 291, 072	2. 9
1939	74, 147, 443	20. 8	25, 860, 639	21. 5
1940	81, 676, 848	10. 2	29, 142, 593	12. 7
1941	106, 349, 907	30. 2	34, 351, 301	17. 9
1942	87, 099, 471	−18. 1	30, 498, 388	−11. 2
1943	97, 651, 419	12. 1	30, 079, 593	−1. 4
1944	94, 350, 906	−3. 4	29, 238, 796	−2. 8
1945	96, 401, 673	2. 2	30, 612, 355	4. 7
1946	107, 185, 838	11. 2	35, 516, 404	16. 0
1947	133, 502, 858	24. 6	41, 046, 308	15. 6

[1] Du Pont's answer to Interrogatory No. 1.
[2] Compilation by American Viscose Corporation submitted February 1, 1950.
N. A. Not available.

5322 Q. I am talking about your exhibits. You have presented no comparisons as to the maximum speed of casting machines?

A. The maximum—no, I have not.

Q. You had that data available in these documents you have relied on?

A. I had material furnished by the Du Pont Company——

Q. And by Sylvania?

A. And by Sylvania. However——

Mr. Minicus. Your Honor, I have a very pertinent objection to this question.

The Court. Well, I have not heard the witness complete his answer. Will you read the answer to me, please.

(The Reporter read the following:)

"Answer: I had material furnished by the Du Pont Company——

"Question: And by Sylvania?

"Answer: And by Sylvania. However——"

The Witness. However, those statistics furnished by the Du Pont Company did not show the speed for each machine installed in the various plants and I was therefore unable to make a weighted average of the speeds, not only for a particular plant but for the entire company as well.

By Mr. Gesell:

Q. Did you make any effort to compare the maxi-
5323 mum speed of the cellophane coating machines?

A. No, I did not.

Mr. Minicus. Your Honor, I still have an objection.

The Court. Yes, I want to hear it.

5324 Mr. Minicus. We served interrogatories on the duPont Company with respect to these speeds. The interrogatories were answered in such a manner that we could make absolutely nothing out of them. Alongside of each machine there would be listed anywhere from three to eight different speeds for the machine. We would like to have made this comparison, but because of the condition of defendant's answer to our interrogatory, it made no sense to us at all.

The Sylvania interrogatories did. We could make something out of them. But we could not figure out the defendant's. They would list 20, 30, 40, 50, 60, 70, 80, 90, up to 100 meters for one machine, and we could not do anything with it. I don't think the interrogatory was responsive to the question. They did not signify what type of cellophane they were making or anything else. I think therefore that any inquiry into the speed is improper at this time.

The Court. Objection overruled. Proceed.

By Mr. Gesell:

Q. You did make a comparison, didn't you, in your Exhibit No. 538 of the number of casting machines?

A. Yes, I did.

Q. You don't know whether those machines are of the same speed at all, do you, or whether they are not?

A. I certainly don't.

5325 Q. Do you know whether they are the same kind of machine?

A. They are not the same kind of machines.

Q. Then what kind of comparison is it if you are comparing two different kinds of machines?

A. They both produce cellophane.

Q. And that is the only basis of the comparison, that they both produce cellophane?

A. Well, it is sold interchangeably and I haven't seen the duPont machines. I have seen the Sylvania machines.

Q. But you compared numbers of machines when you knew that the machines were not of the same type or speed, didn't you?

A. Well, I feel——

Q. Answer my question directly, please, sir.

A. Not 100%, but substantially the same.

Q. How did you know they were substantially the same?

A. Because I compared the production and the potential capacity and the number of machines, and I found that there was a very close relationship between them. Now, if you find that the production and the number of machines has a close relationship, that is a pretty good indication that there is not too much difference between the machines of the two companies. However, I am not contending that they were of the identical same speed, because, of course, that would vary with the types of cellophane produced and many other factors.

5326 Q. You don't know even if they were the same type, do you? You don't know even if they are of the same type?

A. I don't know which manufacturers made the machines. I don't know that the same manufacturer makes the machines. They may be different manufacturers. In fact, my understanding is that those machines were made a long time ago, probably by different manufacturers, but I don't have any personal knowledge of that.

Q. Now, the same is true with respect to potential capacity, isn't it, Mr. Cook? You compared figures on potential capacity, did you not, that were not compiled by the two companies on a comparable basis at all?

A. I discussed that with the Sylvania man, Mr. Beard, the superintendent there, who made that very careful study, because I had some questions about it, and I showed him the answer to the duPont as to how they made up their potential capacity figures after that was received in evidence, and I went into the question very carefully with Mr. Beard and he assured me to the best of his ability that his computation was made on entirely the same basis as the duPont Company. Of course, as we must realize, there are variations in potential capacity as both answers indicate. It would vary somewhat with the different types of cellophane produced and, of course, the speed and all those things, the number of breakdowns that you would have, and records of that kind.

5327 Q. Are there lack of records of that kind?

A. That is very true.

Q. You could not find any records of that kind at Sylvania, could you, on potential capacity?

A. No records are kept by any company, as far as I know, on potential capacity.

Q. The only basis you have of determining whether these were computed on the same basis is that Mr. Beard told you so?

A. No, Mr. Gesell. It went beyond that. They had records. As I said earlier, I consider Mr. Beard made a very careful study of that. He took the records of the machines which were broken down, the time idle; he had some records of that. That didn't go back to the entire period, however, but insofar as his records were available, he did use that to check.

Q. Now, after all this what is your testimony, that the potential capacities were computed on the same basis or on a different basis by the two companies?

A. To the best of my knowledge it was computed on the same basis.

Q. I want to ask you about imports. What period did you show for imports?

A. That was 1930 to 1947, inclusive.

Q. Why did you start at 1930?

A. Because there was an exhibit, the number of which
5328 I believe was 182-A, and that was for 1930, and I didn't know of any reason to start with earlier years, because Sylvania was not an important factor in the business before that time; it was primarily duPont. I had to start sometime, so I felt that 1930 was just as good a time as any.

Q. Why didn't you start with the beginning of this business in 1925, Mr. Cook?

A. I didn't see any particular reason to do that because—

Q. Weren't you aware, Mr. Cook, that the figures would show substantial imports in those early years and that it would throw many of these percentages off?

A. I think that is very true. I think there were lots of imports in those early years; there is no question about that. The imports were rather significant in those early years.

Q. Why didn't you show that when you were computing these market percentages?

A. I didn't think it would give a fair picture, because the imports were relatively important in the early years, but the imports became unimportant in about 1930.

Q. And it was your purpose to show their unimportance rather than any importance they might have had; is that it?

A. It would have been more effective, I guess, to show by contrast that at one time we did have lots of imports of 5329 cellophane, but after 1930 we had practically none. I don't hide that. I think that has brought out in the record so far, as I recall the testimony, that there were lots of imports.

Q. You recognize that they were about 20% of the business in those early periods, don't you?

A. I would not question that. I don't have the records in front of me, but I think they might well be 20%. I don't know which year you are referring to.

Q. Did you prepare Exhibit 548, Mr. Cook, which I hand you?

A. I did not.

Q. Have you ever made any effort to check its accuracy?

A. No, I have not made any complete check on that. I have looked at it. I haven't checked it.

Q. You had nothing to do with its preparation?

A. No, Indeed.

Q. Do you recall Exhibit 546-B, Mr. Cook.

A. I don't believe I do.

Q. That was the comparison of certain costs for plain and moistureproof cellophane for a series of years?

A. A table?

Q. Yes.

A. Yes, I think I recall that.

Q. Can't you pull that out of your papers?

5330 A. I will see. I don't seem to have that particular table or exhibit. If some one would——

I have it now.

Q. What costs did you take into account there?

A. Mill costs plus selling expenses.

Q. Why didn't you include other costs?

A. There are no other costs given.

Q. There are no other costs, you say?

A. Not on those particular tables. There may have been——

Q. What about administrative costs? Didn't that show on the tables?

A. I don't believe it did. I would be glad to look at the tables.

Q. Will you?

A. I will be glad to look and see. I don't recall that it did.

Q. Take a look.

A. I have the exhibit before me now, page 6716, Exhibit 495-A, which is headed "Cellophane Division Annual Summary," and that table shows sales volume, gross receipts, average price received, mill costs, selling expense, net receipts, total net receipts.

Q. Isn't there a later table that shows these other costs I am talking about in that same report?

A. There may be some other figures. I believe there are,
5331 yes. I took these particular figures because they did not see fit to include them, and I figured that they might have a reason for only putting these figures in there. This appeared to me to be a comparable series from 1937 to 1941. On page 6717 there is a breakdown there where they have mill costs, selling expense, and also administrative expense, which is a very small item, and freight and delivery also.

Q. So you only included some of the costs, not all of the costs, in that comparison?

A. I included all the costs for this table which was also included in the annual summary there.

Q. You testified, Mr. Cook, that you had conducted research into the market conditions attendant upon the cellophane industry, and that you found no other source of supply to domestic purchasers of cellophane other than duPont and Sylvania and this small amount of imports that you were talking about. What period of time did this survey cover? What years?

A. That would cover 1925 to 1947, inclusive.

Q. Now, I have one other question here. Will you refer to your chart No. 561. It is this bar chart.

A. I have it.

5332 Q. That covers the period '44 to '47, doesn't it, Mr. Cook?

A. That is true.

Q. Did your studies indicate that that was a representative period for this kind of study of the cellophane industry?

A. I think it is representative. However, there are other charts which show the details going back.

Q. But you consider this a representative period?

A. I consider that that is representative in relationship to other years before that.

Q. Well, you don't mean to suggest, do you, by this table that there were normal conditions in the cellophane business for the period that this chart covers, '44 to '47, that each producer, for instance, was free to increase capacity, or that there were adequate raw materials available, or that you could build new casting machines?

A. I would certainly think you would have to consider that there was a war on and there was some change in demand and supplies, and of course you would have some effect by the war conditions during those years. I thought that was probably well known or I would have put a footnote to that effect.

Mr. Gesell. I have no further questions, your Honor.

Redirect examination by Mr. Renninger:

Q. Mr. Cook, will you please look at Government Ex-
5333 hibit 192, which is the Du Pont Cellophane price list for
November 1, 1941. Will you look on the second page of that exhibit. Do you see an item there entitled "Moistureproof 'Cellophane' Types"?

A. I am sorry, I don't have that exhibit here. What is the date of the price list?

Q. November 1, 1941.

A. I now have in front of me Government Exhibit 192. What is the question?

Q. On page 535, the bottom right-hand corner. Will you please read what it says as to "Moistureproof 'Cellophane' Types".

A. "There are two types, MT for use with adhesives and MST for heat sealing. Please specify which type desired."

Q. On that price list do you see a price there for 300 Moistureproof Transparent?

A. Yes, I do.

Q. What is that price, for 500 pounds or over?

A. That is 44 cents, I believe.

Q. It is 41 cents. I think you have a poor copy.

A. It is not very clear. I have the price list now. It is 41 cents.

Q. Do you have Government Exhibit 190-A before you?

A. I do.

Q. Will you please look at page 531-B, the left-hand corner, "Moistureproof 'Cellophane' Types". Will you please
5334 read what it says there.

A. "Moistureproof 'Cellophane' Types. There are two types, MT for use with adhesives and MST for heat sealing. Please specify which type desired."

Q. From this price list can you state what is the price for No. 300 Moistureproof Transparent for 500 pounds or over?

A. 44 cents per pound.

Q. Now, Mr. Cook, I call your attention to Government Exhibit 396 at page 5499.

A. I have it, Government Exhibit 396, page 5499.

Q. Do you see 300 MT listed there?

A. I do.

Q. Under the year 1941, what is the price given for 300 MT?

A. 41 cents.

Q. On this same page do you see No. 300 MST listed?

A. I do.

Q. What is the price given there in 1941 for 300 MST?

A. 41 cents per pound.

Q. Now, let us look at the same exhibit, No. 396, at page 5495.

A. I have it, page 5495.

Q. For the year 1941, what is the pound figures given for 300 MT, approximately?

A. About 9,000,000 pounds.

5335 Q. And for 300 MST?

A. About 20,000,000 pounds.

Q. Mr. Cook, going back to Exhibit No. 192, the Du Pont Cellophane price list for November 1, 1941, how long did that price list remain in effect?

A. Until the end of 1946.

Q. I notice on Government Exhibit 192 a listing for 450 Moistureproof Transparent Cellophane in rolls.

A. What is the exhibit number now?

Q. 192; that is the Du Pont price list for November 1, 1941.

A. Yes, I have that price list, effective November 1, 1941.

Q. I notice on that price list under "Rolls" a number 450 Moistureproof Transparent. Is that included in your compilation of Government Exhibit 549?

A. That was not included.

Q. Why was it not included?

A. As I recall, that was not included because there were only three price lists, 1938, '39 and this one, in which there were figures for both Sylvania and Du Pont for that particular type, and owing to the few years I did not include it. However, I noted that the prices were identical as between those three price lists for that particular type of cellophane.

Q. Mr. Cook, I think you stated that you did not make

5336 a price comparison of jobber price lists.

A. I did not.

Q. Why did you not make a comparison?

A. Because I didn't have jobber prices available. I did compare one jobber price with a price which I had and I found there was no difference, but my understanding was that the prices which had been furnished to me in response to the interrogatories were the prices for cellophane, and I did not know, or did not understand that there was any difference between the jobber prices for the same items or classifications.

5337 Q. Did you have before you a Sylvania jobber price list?

A. I had no Sylvania jobber price list, and I understood that there were none available.

Mr. Minicus. We just have one more question, your Honor.

By Mr. Minicus.

Q. Mr. Cook, I draw your attention to Government Exhibit 561, which I believe you testified showed for the six bars there available that that was intended to present for the four-year period involved, 1944 to 1947, a summary of the relative position of the companies with regard to production of cellophane, production of M. T., production of P. T., their dollar sales, their potential capacity, and the number of casting machines in operation. Now, with respect to the date of the filing of the complaint what do the years 1944 to 1947 represent?

A. They represent a four-year period approximately prior thereto.

Q. Immediately prior thereto?

A. Immediately prior thereto. I think the complaint was in December sometime, and it would be approximately a four-year period prior to the filing of the complaint.

Q. Now, Mr. Cook, did you make the other charts that you have testified with regard to, containing the information 5338 that is summarized for that four-year period in this chart in detail for other years?

A. Yes, it is all in the statistical tables.

Q. Let me ask you one other question, Mr. Cook: to the best of your recollection if you took any other four-year period during which both duPont and Sylvania were engaged in the manufacture and sale of cellophane, would any of the functions here portrayed vary greatly?

A. You would get about the same type of chart if you took any consecutive four years during the period at which both of them were producing.

Mr. Minicus. Thank you, sir. That is all.

Mr. Gesell. No questions.

The Court. Have we left I, C, 2 now, or are we still on it?

Mr. Renninger. We are still on the same general heading, your Honor.

The Court. I think we will take our mid-morning recess at this time.

(At this point a brief recess was taken.)

Mr. Renninger. If your Honor please, on Friday I was discussing the Government's position that duPont had the power to set an arbitrary, non-competitive price for its cellophane and 5339 caps and bands due to its dominant position in the industry; that this price was set to yield a high margin of profit; and that this arbitrary rate was a price for all cellophane caps and bands, and that it was able to impose its price upon Sylvania and Celon by reason of its power.

The COURT. How do you detect the arbitrariness about the fixing of the price? How do I gauge that? What is the technique I use? What is the judicial measurement to find that a price is arbitrary? I would like to understand that fundamental as we approach the further phases of the case.

Mr. RENNINGER. If your Honor please, our contention is that duPont in the fixing of its ~~price was~~ able to fix that price by itself without consideration of any other of the manufacturers in the industry. It was able to set the rate as it wished, and as one of the duPont officials stated in 1930, "This price will give anyone contemplating manufacture and sale of cellophane an idea of what we think the price should be."

The COURT. Would that not be a necessary concomitant to any company which does not have a great number of competitors? Does it proximately follow that any company in the position that duPont was in in this industry, when it fixes a price, it is arbitrary? When does it become arbitrary and when does it cease to become arbitrary? Or how can it not be arbitrary?

5340 Mr. RENNINGER. Well, as we have pointed out, the rate of return on the investment, of course, was quite high.

The COURT. Well, we had some difficulty last week with those figures on that subject.

Mr. RENNINGER. Yes, they varied from year to year. Of course, in the early years it was, I think, in the 30's——

Mr. GESELL. Wait a minute. That table was withdrawn, your Honor.

Mr. RENNINGER. I am speaking from the documents that I introduced into evidence last Friday.

The COURT. Here is my difficulty, and I am asking for help: What action could duPont have taken under your theory of the case where its price would not have been arbitrary? We will start at the lower end of the scale, and I would say if they sold at cost it would not be arbitrary, would it?

Mr. RENNINGER. That is right.

The COURT. Where above cost does it become arbitrary? I am not jousting with you; I just want to follow the theory of your case on that point of arbitrary price-fixing.

Mr. RENNINGER. As Judge Lerned Hand said in the Alcoa case,
10% return he did not necessarily consider as being arbitrary. He
left the case pretty much up in the air, though, as to what would
not be arbitrary. We feel that the rate of return as shown
5341 in the documents that I introduced into evidence Friday is
such a great rate of return as to justify the arbitrary designation.

Also on the question of setting of arbitrary prices, it is the Government's contention, whether it is arbitrary as to the competitors also, it fixed the price without consideration in any way, shape, or form of Sylvania; that the price that duPont set was the price for all of the manufacturers in the field. They had to follow the duPont price.

I don't know whether I have made it any clearer to you, sir.

The COURT. Yes, you have stated your position, your reference to the Alcoa case. I still have thoughts, but I am not going to interrupt your presentation to pursue the discussion further.

I wish you would have in mind sometime to explain to me if it is an accepted function of Department of Justice under the anti-trust laws to virtually be an OPA by saying 10% is what you can charge, no more, no less. I am just playing with the concept of arbitrary price-fixing in an anti-trust case.

5342 Mr. RENNINGER. Of course, an arbitrary price is only to show the monopoly power. The power over an industry that we allege Du Pont had is one of the facets of monopoly power.

The COURT. This is a different concept of price fixing, or is it, where you have one or more in combination fixing the price?

Mr. RENNINGER. That is right.

The COURT. This is evidence, you say, of the monopolistic power?

Mr. RENNINGER. That is right, sir.

The COURT. I understand. Proceed.

Mr. RENNINGER. It is the Government's contention that at various times due to lack of knowledge as to the price to be charged for certain items, for certain types of cellophane that might not have been on the printed price list, or because of other difficulties in the industry the parties in the industry were not above getting together to iron out or settle these minor variations.

* * * * *

5343 We now come to that phase of our case where the Government alleges that at certain times where certain aberrations occurred in the almost identity of prices that there were various agreements or understandings as to identity of prices or yield, or as to the quality of the product between duPont and Sylvania.

Offers in evidence

The Government offers into evidence Government's Exhibit 273, page 731. This is a letter from H. D. Chickering of the Sales Section to the Sylvania Industrial Corporation, dated March 16, 1939.

5344 (The letter from H. D. Chickering to Sylvania Industrial Corporation dated March 16, 1939, was received in evidence and marked "Government's Exhibit No. 273.")

Mr. Renninger (Reading.)

"Gentlemen: It will be greatly appreciated if you will kindly forward us sample booklet of your film and your current price list for this material. Any descriptive literature will also be welcome, since we are naturally interested in keeping abreast with the ever changing picture of commercial wrapping material."

The Government offers into evidence Government Exhibit No. 274.

Before going into 274 I would like to finish the last paragraph of Government Exhibit 273, which reads:

"Our genuine desire is to be as cooperative as possible, and we will gladly reciprocate by sending you our new sample booklet and recently revised price list. Thanks in advance for whatever you may send us."

Government Exhibit 274 is from D. K. Shoop of the Sales Section of duPont to the Sylvania Industrial Corporation, Attention Mr. H. H. Hamburg, dated April 24, 1939.

(The letter from D. K. Shoop to Sylvania Industrial Corporation dated April 24, 1939 was received in evidence and marked "Government's Exhibit No. 274.")

Mr. Renninger. (Reading.)

"Dear Mr. Hamburg: Thank you very much for your courtesy in sending us a copy of your current price list together with
5345 your sample booklet.

"Attached is a price list on 'Cellophane' cellulose film which reflects our 19th price reduction. Unfortunately, our new sample booklet has been delayed at the printer's. When released, a copy will be sent you promptly."

The Government introduces into evidence Government Exhibit 283, page 746-748. This is a letter from Mr. C. M. Albright, Manager—Control Division of duPont, to Mr. L. A. Yerkes, General Manager of duPont, dated February 4, 1941.

(The letter from C. M. Albright to L. A. Yerkes dated February 4, 1941 was received in evidence and marked "Government's Exhibit No. 283.")

Mr. Renninger. (Reading.) "Pursuant to your request, I am attaching comparative statement showing sales of Moistureproof 'Cellophane' and average price received by duPont for the year 1938, 1939 and 1940 by quarters, as compared with those reported by the Sylvania Industrial Corporation.

"Although it is interesting to note that almost without exception, duPont average prices are higher for the last two (2) quarters of the year and lower for the first two (2) quarters of the year, there is, nevertheless, a very much greater variation in the average price for the last quarter of 1940 than either 1938 or 1939."

This letter has a handwritten notation at the top of 5346 the letter from L. A. Y., evidently L. A. Yerkes, addressed, 1, to E. M. May; and, two, to J. E. Hatt. The notation says, "I would discuss this with Wallach." As your Honor knows, Wallach was the original founder and first president and the power behind the Sylvania Industrial Corporation for many years.

The Government offers into evidence Government Exhibit 293. This is a handwritten document with the initials E. C. L., evidently E. C. Lake of duPont, addressed to Mr. Hatt and Mr. C. F. Brown, dated October 31, 1941.

(The memorandum from E. C. L. to Mr. Hatt and C. F. Brown dated October 31, 1941, was received in evidence and marked "Government's Exhibit No. 293.")

Mr. Renninger. (Reading.) "Little of Sylvania says:

"1. They are already producing 450 in new gauge.

"2. It will be 11/10 (or perhaps a bit later) before 300 production is on new gauge.

"3. Both rolls and sheets of old gauge will be invoiced at old prices until stock is cleaned out and he estimates this will happen sometime between 11/15 and 11/30/41."

The Government introduces into evidence Government Exhibit No. 294, page 759. This is a document authenticated by Mr. Replogle several days ago. It is a letter from Sylvania Industrial Corporation to our customers, dated November 1, 1941.

5347 (The letter from Sylvania Industrial Corporation To our Customers, dated November 1, 1941, was received in evidence and marked "Government's Exhibit No. 294.")

Mr. Renninger. I will just read the first paragraph:

"We take pleasure in enclosing herewith our new price list No. 16-L for Sylvania cellophane, effective November 1st, 1941. While prices per pound for rolls remain unchanged the prices for cut to size sheets have been reduced in proportion to the increased area or yield per pound of cellophane. See table of approximate yields in the price list. List prices for stock size sheets have been abolished and all sheets of the greater yield, whether cut to size or stock size, will be invoiced at the uniform list price. The net result of these changes is to reduce your cost of Sylvania cellophane.

"Cash discount has been reduced to 1%."

The Government offers into evidence Government Exhibit No. 225. This is a letter from the Sylvania Industrial Corporation with the initials H. H. R. at the bottom, addressed to "To Entire Sylvania Sales Division," and is entitled as "Supplement To Sales

Bulletin No. 419, November 7, 1941." It is dated November 14, 1941.

(The letter from Sylvania Industrial Corporation to Entire
Sylvania Sales Division, dated November 14, 1941 was
5348 received in evidence and marked "Government's Exhibit
No. 225.")

Mr. RENNINGER. (Reading.) "Re: Stock Size Sheets.

"Effective immediately stock size sheets will NOT be supplied in the old thicknesses or yields shown on price list 15: All stock size sheets will hereafter be supplied in the new L thickness or yield per price list 16-L and will be invoiced at list prices in price list 16–L."

We now come to that group of exhibits that Mr. Replogle identified when he was here. 5478 I don't intend to read in full. This is just a letter from Mr. Replogle to Mr. Mielke, dated October 7, 1941, in which he advises Mr. Mielke about the change in yield of the cellophane and of the change in cash discount from Sylvania
to Blake, Moffitt and Towne from 2% to 1%.
5349 Government Exhibit 5479 is a letter from Mr. Mielke to
Mr. Replogle objecting strenuously to the change in discount.

Government Exhibit 5480, page 5374 to 5376 is a letter from Mr. Replogle to Mr. Mielke dated October 17, 1941. I will just read part of the second page of this letter, or page 5375:

"With respect to the cash discount. Our big competitor has seen fit to withdraw cash discount entirely effective November 1st and have established universal terms of '30 days net'. I cannot believe that they would allow Zellerbach to use more favorable terms with the latters customers because of the effect and reaction it would have with duPont's own customers. Furthermore duPont are selling converters and some others direct on the Pacific coast and themselves could not of course give their direct Pacific coast customers better terms than accorded their direct customers in other parts of the country. In any event this is the psychology which we must apply to our own business. If these changes in cellophane sales operations only cause your collection department inconvenience of having to check payment discount different than for your other lines you are lucky.

"However I believe both you and Zellerbach will make some logical readjustment upwards of your exwarehouse surcharges.

"As stated above Ed Persike has a lot of information
5350 for you which would be difficult to convey in a letter and
he is authorized to tell you everything. After you have talked to him I would be very glad to have your further comments.

Government Exhibit 5481, pages 5377 to 5379 is a report by Mr. Persike to Mr. Replogle dated October 27, 1941. I will read the fourth paragraph on the first page, 5377:

"While Mr. Mielke did not like the change in terms, particularly on cellophane sales, he has agreed to this as I pointed out to him that the discount of 1% could not be divorced from the reduction in the caliper of approximately 7% in our cellophane sheets to equalize our competitors reduction of 8% with the cash discount withdrawn."

On page 5378, the second paragraph:

"We had quite a discussion in regard to our new policy of selling cut to size and stock size sheets at the same price. As you know BMT purchase stock size sheets which they in turn use for filling their cut to size orders. Excluding waste, they make a gross profit of 12% on P-1 and 14% on M. P. in selling the same as the 7MM square inch quantities I have advised Mr. Mielke to await our new prices on sheets and when this arrives our prices (net) will be no higher or lower than competitors material and that an adjustment should be made on the Coast on cut to size sheets for spot delivery or mill shipment to enable them to obtain a fair profit
on this type of business. The same applies to rolls pur-
5351 chased FOB San Francisco and delivered out of stock. I
am restrained in being too explicit in regard to this matter for reasons which you will understand, however, believe this matter can and will be worked out satisfactorily to all concerned."

Government Exhibit 5482 is a report by Mr. Persike of Sylvania to Mr. Replogle dated October 28, 1941:

"We obtained reliable information today that our competitor has permitted their agent (after considerable pressure) to allow them to sell their cellophane on the Coast at a price to include a cash discount of 2%. They will advance prices 2% so that a cash discount of 2% may be deducted on all invoices. As an illustration, they intend selling #300 MST at a price of $.4184 per pound for rolls in quantity of 500# or more with cash discount of 2%, which is .0084 making their net selling price $.41 per pound.

"I am restrained at this time in divulging source of this information, however, you may rely on its authenticity. I believe you understand this situation without further comment from me. My reason for rushing this information to you is the fact that I would not be at all surprised if some counter proposition may be made by BMT and if this is done direct by Mr. Mielke to you, you will have the above as a background. Mr. Mielke stated this afternoon that he was going to have a talk with Conner tomorrow
and would probably call me in to take part. Should any-
5352 thing develop in regard to changing our terms I will advise
you pronto. Meanwhile, I would suggest that you make no

mention of this and let any further development come from Mr. Mielke. I will try to hold matters as they now stand."

The next exhibit, No. 5483, is a letter from the Sylvania Industrial Corporation to Mr. O. W. Mielke dated October 30, 1941. The letter is evidently from Mr. H. H. Replogle by his typewritten name at the end.

"DEAR MR. MIELKE: Mr. Persike has written me that he had a long and very pleasant session with you and believe that he covered all of the questions which you had in mind plus telling you regarding our whole situation and conditions at the present time. Therefore instead of writing you further and at length I am rather expecting another letter from you indicating your understanding and acquiescence.

"I infer from his personal report to me that the only thing with which you may still feel dissatisfied or uncertain is the item of cash discount to your customers on the Pacific coast. If you have any suggestions or a proposal regarding this which will not 'upset our own apple cart' we certainly are not so obstinate or determined that we will not at least consider them.

"I realize that a certain portion of your cellophane sales is in conjunction with other materials. However on the other
hand with your larger cellophane buyers it is an inde-
5353 pendent item. Dupont has withdrawn the cash discount
entirely. You may want to ascertain what Zellerbach is actually going to do or is permitted to do by duPont before offering a counter-suggestion. However keep in mind that officially duPont has withdrawn all cash discount as of November 1st whereas we will still be giving 1% cash discount."

Government Exhibit 5484 is a report by Mr. Persike to Mr. Replogle of Sylvania dated November 1, 1941, marked "Personal & Confidential."

"DEAR MR. REPLOGLE: Mr. Mielke handed me a copy of his letter to you under date of October 30th yesterday. He asked me to advise you that the word 'customer' should have been competitor. He purposely used the word 'customer' thinking you would understand what he had in mind.

"It is necessary for me to be more explicit in my letters to you than seems possible by others for reasons which you will understand. I know that you will treat these matters in the strictest confidence.

"In my letter of October 28th I gave you an outline of the procedure which no doubt will be followed in the sale of rolls on mill shipment and the advances in prices on various grades to allow a 2% discount. The net price would conform with prevailing prices other than the Pacific Coast.

"Due to the absence of one of the interested parties 5354 for about two weeks, the basis of sale or rather conditions of sale of cut to size sheets and rolls from stock will be deferred. This will probably be arranged to add the cost of freight and tare with an upcharge of 10% on cut to size sheets over our prevailing prices and to include a 2% cash discount on cellophane sold out of stock. Rolls will probably be sold out of stock as heretofore with an upcharge of $.05 per pound to include freight, tare and an additional 1% discount so that rolls also will be sold out of stock at a 2% discount. These conditions are tentative and will advise you later definite basis when this is established. You may rest assured that we will see the program of the opera before it takes place so that any adjustments which may be necessary to effect the necessary balance will be made. I am assuming that you will have no objection to this procedure and the matter of 2% discount on out of stock sales."

Turning to the next page, 5385, the second full paragraph:

"Inasmuch as our competition intends to advance their prices on mill shipments on the basis outlined in my letter to you dated October 28th to include a cash discount of 2%, I feel sure that Mr. Mielke would appreciate your according them the same privilege. While he has made no mention of making this request, Mr. Mielke's letter to managers in the last paragraph dated October 29th 5355 of which I understand a copy was sent to you, he mentions the possibility of adding enough to our prices to include a 2% cash discount. The thought occurred to me that if you deem it advisable and are willing to allow BMT this privilege it would serve a very useful purpose in showing our good will to BMT in beating Mr. Mielke to the post in advising him that should their competitor decide the advance their prices on mill shipments to include a 2% discount it is agreeable to you for them to do likewise, however the balance between yield and selling price must be taken into consideration. Should this be done it would make our price on the Coast in 500# orders on #300LPMS $.4141 less 2% whereas competitive prices would be $.4184 less 2%. The difference in yield between 7 and 8% would balance these prices. BMT would purchase their cellophane from us at our prevailing prices less our cash discount of 1% which would make no change in our selling prices to them, or terms.

"I understand that Mr. Mielke wrote Milprint in regard to their terms which were to be on a net basis. In reply to his letter they agreed to change their terms to 2% cash discount on BMT invoices is sure being taken seriously by Mr. Mielke and have given you the foregoing so that you will have a clear picture of the whole matter.

"Please consider this letter confidential as you are familiar with the reasons why information of this kind is not usually written in letters."

5356 Government Exhibit 5485, page 5386, is a letter from Mr. Replogle of Sylvania Industrial Corporation to Mr. O. W. Mielke of Blake, Moffitt & Towne, dated November 4, 1941.

"DEAR OTTO: Thanks very much for your letter of October 30th. The following does not apply to or refer to your resale to your customers, it applies only to B. M. T.'s purchases from Sylvania.

"We are going to continue your cash discount of 2% on your purchases of Sylvania cellophane from us.

"The writer is endeavoring to ascertain authentically what our competitor will agree to in the matter of resale prices and terms on the Pacific coast with his agent."

Government Exhibit 5487 is a letter from Mr. Replogle of Sylvania to Mr. O. W. Mielke, Blake, Moffitt & Towne, dated November 6, 1941.

"I have authority of reason to believe that if you and your opponent should decide to make Pacific coast prices 2% higher than schedule and then continue your standard cash discount of 2% to customers it will be agreed to by our opponent. Such being the case we would of course likewise agree."

The COURT. Agreed to by whom?

Mr. RENNINGER. "Our opponent." "I have authority of reason to believe that if you and your opponent—" of course that opponent he is speaking about Zellerbach, that is, BMT's opponent, or Blake, Moffitt & Towne's opponent, "* * * should decide to 5357 make Pacific coast prices 2% higher than schedule and then continue your standard cash discount of 2% to customers it will be agreed to by our opponent," which is evidently duPont.

Mr. GESELL. Oh, now, wait a minute. The man testified on the stand that he did not talk to duPont about this matter at all, your Honor.

Mr. RENNINGER. He didn't say he did not talk to duPont about the matter. He said he might have talked to a customer or someone from Zellerbach's office on the West Coast.

Mr. GESELL. That is right. It is perfectly clear he did not talk to duPont. This is among that bunch of hearsay documents as to which I have a motion to strike, your Honor. There is nothing to indicate that the word "opponent" means duPont.

Mr. RENNINGER. Government Exhibit 5488, page 5389, is a letter from Mr. Mielke addressed to "My dear Harry." This document was taken from the files of Sylvania Industrial Corporation, and it is dated November 10, 1941.

"I am making this strictly personal, hence the omission of our letterhead. I want to acknowledge both your letters of November 4 and 6, the latter being particularly confidential.

"I appreciate very much the special concession you have granted and I am sure it will be appreciated by our entire group, but as far as the resale price is concerned, as I have already intimated to you, I am satisfied we shall wait to see what our friends are going to do about their list. Whatever it is, no doubt we shall follow it, subject of course to the difference in yield of the product, in which they have an advantage. To offset same we shall of course adjust our selling price so as to not put us at a disadvantage.

5358

"Just as soon as I get the remaining facts you will hear from me."

5359 The Government introduces into evidence Government Exhibit No. 5490, page 5391. This is a memorandum from Mr. J. E. Hatt, Division Manager, to R. E. T. Haff, subject: "Cash Discounts—San Francisco Trade," dated August 19, 1942.

(Memorandum from J. E. Hatt to R. E. T. Haff, dated August 19, 1942, was received in evidence and marked "Government's Exhibit No. 5490.")

Mr. **Renninger.** The only purpose of putting this in is to show that duPont changed its discount or rather the San Francisco jobbers included in their price a mark-up to cover the cost to the San Francisco trade.

I will read the first paragraph:

"At the time we eliminated the cash discount on sales of cellophane, our San Francisco jobbers included in their price a slight mark up to cover this and continued to allow discount where sold in connection with paper materials to regular trade."

The Government offers into evidence Government Exhibit 296, page 761. This is an inter-office communication from Mr. C. F. Brown to Mr. T. L. Hines of the duPont Company dated August 28, 1942, subject: "Competition."

(The inter-office communication from C. F. Brown to T. L. Hines, dated August 28, 1942, was received in evidence and marked "Government's Exhibit No. 296.")

5360 Mr. **Renninger.** (Reading.) "One factor that might be an important reason for competitive gains is yield factor.

"Sylvania's published yield factor for 300 MT is 20,800 sq. in.—ours is 21,000—a difference of 1%.

"That alone accounts for 1% increase in their proportion of business.

"In addition, we know that they have retained the old gauge (19,500) per lb. on a MT bag film which is 7.5% more pounds per sq. in. than ours.

"We also know that they have offered this old gauge film rather broadly to anyone who wants it—capitalizing on its 'greater strength.'

"There are some indications also that they had trouble producing a satisfactory thinner gauge film—and very possibly their actual unit weight is heavier than published figures.

"I wonder if you can develop some information regarding actual area factor of standard MT film and proportion of old gauge film being sold the next time you talk to Reichel?"

The **Court.** That letter may have some meaning to some one skilled in the industry. I don't know what it is about. What has it got to do with the case?

Mr. Renninger. The only thing we are showing here is that evidently there was a difference in yield between the film. The first thing is duPont noted that Sylvania was making competitive gains. The first paragraph reads——

5361 The **Court.** Don't read it again, please. I want you to tell me what your purpose is in reading it to me in the first place.

Mr. Renninger. When it is a question of what the yield factor would be between duPont cellophane film and Sylvania cellophane film, if duPont wanted to find out what Sylvania's yield was they suggest—Mr. Brown suggests to Mr. Hines that they talk to Dr. Reichel of Sylvania as to what Sylvania's yield is. Of course, the yield is the gauge, the amount of cellophane per pound.

The Government offers into evidence Government Exhibit No. 297, page 762-763. This is a letter from Mr. T. L. Hines of duPont to Dr. F. H. Reichel of Sylvania."

(The letter from T. L. Hines to Dr. F. H. Reichel dated October 5, 1943, was received in evidence and marked "Government's Exhibit No. 297.")

Mr. Renninger. I don't intend to read it. Mr. Hines just discusses with Dr. Reichel the rates of pay for operators at the cellophane plant.

The **Court.** Let us get a number of these exhibits out of the way first.

Mr. Gesell. We raise no objection with respect to 333, which is one in the series, but press the objection as to 329, 332 and 339.

My understanding is that those under your Honor's ruling
5362 must be authenticated before the plaintiff's case closes.

We have covered quite a group of different topics in this presentation on prices, and I am going to try to state our position on each of them as succinctly as I can.

The **Court.** Am I to understand, Mr. Minicus, that you have now finished of your index 1, sub-paragraph C, sub-sub-paragraph 2?

Mr. MINICUS. That is correct, your Honor.

The COURT. And that your remarks, Mr. Gesell, are addressed to that entire sub-sub-section?

Mr. GESELL. They are addressed to everything that Mr. Renninger discussed today, and he started, I think, in the middle of that section, your Honor.

The COURT. I see.

Mr. GESELL. So I really take up with Exhibit 474 in that section, which was the beginning exhibit in his discussion of cap prices, at page 5954.

Now, Mr. Renninger started out again using his pet phrase "arbitrary and non-competitive prices," and these first exhibits, as I understand it, are offered for the purpose of proving that duPont established arbitrary, non-competitive cap prices.

Your Honor asked what the judicial test for arbitrary prices is.

5363 I know of no test by which you can determine whether the prices set here were arbitrary, but I suggest we don't even come to that issue, because if they were competitive prices, clearly they cannot be arbitrary prices. If these were set as a result of pull and tug in the market place, what Mr. Minicus calls a free interplay of competitive factors in the market, then obviously they are not arbitrary, and that is why Mr. Renninger and the Government's trial brief and many of their statements constantly link the words "arbitrary, non-competitive prices."

* * * * *

5364 We then came to a discussion of documents bearing different dates scattered through this group relating to specific communications back and forth with Sylvania. There are documents here where we sent to Sylvania four, five or six months after we published a price list a copy of our price list. I cannot see how agreement can be inferred from that. We have seen that Sylvania picked up the price list in the trade almost immediately upon its announcement. There is one document here, your Honor, which I believe has been undoubtedly inadvertently put in out of context. That is Exhibit No. 283. That was the letter on which Mr. Yerkes wrote, "I would discuss this with Wallach," a letter from the Control Division to Mr. Yerkes, noting that there was a great discrepancy between the average prices of duPont and the average prices of Sylvania.

The reason that issue came up, I think is perfectly clear, and your Honor will see it when the rest of the proof is in. It is marked "P. M. M. Royalties." It comes from the Control Division, not the Sales Department, and it is concerned with a question that has been raised as to whether Sylvania is properly reporting its royalties under the license agreement, which we are going to

come to in this Act 3 of this tragedy that comes along pretty
5365 soon. But this did not have to do with price connivance;
this had to do with a financial man's inquiry on a royalty matter, because the royalties were a percentage of net selling price, as you will see when we come to basic agreement, which is in another section of the case though of course it was signed many years before this letter was written and, of course, they were going to discuss it with Wallach, because if he was not reporting his royalties correctly, he owed duPont some money and duPont wanted the money. He was using the patents. And I don't see anything of a collusive price character about that.

Mr. Minicus. I don't understand where Mr. Gesell is drawing all these inferences from, your Honor. We will see when we get to the moistureproof section of the patent section that duPont had a regular arrangement with Sylvania whereby they could go in at any time and examine the books of the Sylvania Company, and it didn't take a private discussion between Mr. Wallach and Mr. Yerkes to do it.

Mr. Gesell. You see, his theory is, your Honor, that we should have retained Price-Waterhouse for $120,000 to make a complete audit of Sylvania rather than ask the man why it was this discrepancy appeared. And if we had made the audit, we would be charged here with surveillance of the company. The trouble is, you cannot conduct business in a normal, natural way under this all-pervasive interpretation of the Aluminum Company case. If
prices go up, it is wrong. If they stay the same, it is wrong.
5366 If they go down, it is wrong. If you don't think about
your competitor when you fix prices, it is wrong. If you talk about them you are collusive. If you put in a new plant to meet capacity, then you are grabbing the market. If you don't put in enough, you have a shortage. We get constantly an indication from the Government's table of the willingness to take any normal business act and twist it to meet their own purposes. I say this was a normal business act and had nothing to do with collusive prices.

Now, there remain for discussion this group of very mysterious documents which Mr. Replogle identified when he was here on the stand. It looks to me as though there was some conniving going on between Sylvania and its West Coast distributor, and Mr. Mielke in particular, and they wrote without using stationery with their names on it, and they talked about being restrained from divulging the source of the information. But there is no discussion here about duPont. There is no discussion about duPont participating in whatever kind of resale price fixing Sylvania was doing on the West Coast. And if their West Coast distributor without our knowledge was talking with a distributor of ours named Zellerbach—and there is indication that probably he was if the words "friend" and "opponent" and "colleague" or other mysterious sign words that are used in this correspondence mean Zellerbach—that does not bring it home to us, your Honor, and my motion to strike this triple and quadruple hearsay which 5367 is found in Mr. Persike's letters that he wrote after talking to someone, reporting what another person told that someone, in letters to Mr. Replogle that we never heard of or saw stands, and there is not yet any connection that support these documents in the record of this case. I am going to press my motion, as your Honor has suggested I might, at the conclusion of the evidence.

* * * * *

5397 The next group of documents moves us along to the period 1929–1930. Your Honor will recall that this is the period that saw the advent of the Sylvania Corporation. These documents are Government Exhibit 2798 at page 6051, which the Government now moves into evidence——

(Letter from Mr. Hatt to Mr. Pralatowski dated May 13, 1929, was received in evidence and marked "Government's Exhibit No. 2798.")

Mr. Minicus. (Continuing.) Government Exhibit 2799, at page 6052, which the Government now moves into evidence——

(Letter from Mr. Pritchard to Du Pont Cellophane 5398 Company, attention Mr. Phellis, dated June 5, 1929, was received in evidence and marked "Government's Exhibit No. 2799.")

Mr. Minicus. (Continuing.) Government Exhibit 1411, previously admitted, and Government Exhibit 1012, previously admitted.

Here again, in 1929 and 1930, the Du Pont Company caused to be brought about a re-appraisal of its patent situation in light of the probable entry into the field of a new competitor, this time a domestic manufacturer. Once again we find that Du Pont is forced to reject its patents as a means of combating this new competition.

The statement is made, and I think is made on more than one occasion in these documents, that cellophane is an open art, and I quote, "There is nothing to prevent a competitor from manufacturing without infringement." That was 1929–1930, your Honor.

Now we come to a series of documents, Government Exhibit 1329, previously admitted, Government Exhibit 2101 at page 2215, which is now offered in evidence——

(Letter from Mr. Joseph Jordan Eller, M. D., to Mr. W. R. Swint, E. I. duPont de Nemours & Company, dated July 31, 1945, was received in evidence and marked "Government's Exhibit No. 2101.")

Mr. Minicus. (Continuing.) Government Exhibit 2102 at page 2216, which is offered in evidence——

5399 (Letter from Mr. W. R. Swint to Dr. Joseph J. Eller dated August 3, 1945, was received in evidence and marked "Government's Exhibit No. 2102.")

Mr. Minicus. (Continuing.) and Government Exhibit 2014 at page 2070, which is offered in evidence.

(Letter from Mr. J. K. Jenney to Mr. F. A C. Wardenburg, dated February 4, 1946, was received in evidence and marked "Government's Exhibit No. 2014.")

Mr. Minicus. These exhibits, your Honor, are offered only to show that because of the now really advanced age of this art that the duPont Company is admitting that in various countries throughout the world cellophane is an open art; it is an open art in China, in Mexico, in various parts of South America, but the important thing that I find in these documents in 1944 through 1946 is the statement relating to processes.

If we look at Government Exhibit 1329 at page 266—although the surrounding paragraphs also bear on this proposition—we find that the third full paragraph on page 265 summarizes the situation:

"3. The bulk of information comprehended by the technical agreement must over the course of the twenty years or more which have passed since the signing of the first agreements have passed beyond the bounds of secrecy. The original information received from the French has been disseminated among many
5400 associated as well as competitive companies and has appeared in countless patents and literature articles. It is, furthermore, believed reasonable to state that the greater part of the information which duPont now possesses originated with duPont and this information also with the passage of years and in view, among other things, of duPont's liberal patent policy has passed into the domain of public information." So it would seem from that that the processes themselves are not any longer secret.

In 1946 your Honor will recall that in connection with consideration of the alleged illegal divisions of territory on a worldwide basis the Government introduced certain documents concerning negotiations between the Dobeckmun Company, a duPont promotional converter, and the British Cellophane Company, Limited. The background of that story was that Dobeckmun desired that by the purchase and imports of cellophane from B. C. L. and somebody, for some reason or other—I believe it was B. C. L., if my memory serves me—believed it was necessary to get the permission of the duPont Company.

At that time officials of the duPont Company in replying to these requests stated that plain cellophane is unpatented and its importation is free to anyone. That is a clear statement, I believe, that there was no patent protection for plain cellophane at all in 1946.

Now, (turning to Government Exhibit 1213, appearing at page 1473, we have a consideration of the caps and bands situation. 5401 Your Honor will recall that in the early thirties there were some agreements cooking with people abroad relative to caps and bands, and certain letters were transacted whereby, for the time of the existence of the letters at least, and the Government maintains far beyond that, territories were expressly divided. This document shows that one of the considerations there would have been the patent situation with regard to caps and bands, in other words, were there patents on which we could attempt to justify this territorial allocation. I believe the document shows that as to caps and bands the patents thereunder could not be used to justify foreign agreements of this nature. And, of course, we have also seen that at the advent of the duPont Company into the business there was already a manufacturer of caps.

Leaving for a moment the subject of the status of the art in this industry, I would like to turn to a consideration of what for a better name we have called duPont's patent estate. We have seen that the patent holdings in 1923 were meager. The Government will now show that since that time a mass of United States patents have been issued which relate to cellophane and caps and bands. These patents relate to various products, apparati, processes for their manufacture, composition of matter, and the use of such products. Our attention at this moment will be limited to the patents under which rights are possessed by the producers of the products involved, namely, Du Pont, Sylvania, and Celon.

5402 It is the Government's intention as we progress in this matter to bring in information relating to Sylvania and Celon's patents and it may be necessary to employ witnesses for that purpose.

We have said that we are restricting our examination to Du Pont, Sylvania, and Celon. Admittedly patents relating more or less directly to cellophane are owned by others. For example, converters, who make up cellophane in form for use by the consumers, undoubtedly have patents that relate to cellophane. Likewise with fabricators. Because rayon is a companion product many patents reading on rayon also apply over to cellophane, and the rayon manufacturers probably have some patents that indirectly relate to the manufacture of cellophane but they don't use them for that purpose; they use them for rayon.

Many others engaged in the various fields of the broad cellulose industry undoubtedly have patents that read more or less directly on cellophane but are not used for that. We are confining our consideration here, your Honor, to the three people who are vitally concerned with the use of cellophane patents for cellophane, to wit, Du Pont, Sylvania, and Celon.

That position is not without authority. Certainly as a concession to the shortness of life studies of this nature must have a definite point of termination, and Judge Knox so found in the
5403 final decision of the Alcoa case where he followed exactly the procedure here relating his patent studies to the patents held by Alcoa, Reynolds Metal and Permanente, although it is quite apparent that fabricators of aluminum, metallurgists in other fields must have possessed some patents reading more or less directly on aluminum.

There are other difficulties that are inherent in this problem that the Government has attempted to face. It attempted to distinguish between patents reading on cellophane from those relating to caps and bands. In many instances the differences were obvious, but because of the basic similarity between the product, overlapping was found to exist in a great number of patents. We were not the only ones that had this difficulty apparently. It will be noted in the answers to the interrogatories about to be introduced that the defendant found the same difficulty in distinguishing between film patents and caps and bands patents because in many of their designations they have the same patent reading on cellophane and reading on caps and bands.

5404 Now, your Honor, I offer in evidence Government Exhibit No. 2001 at page 1954, and Government Exhibit No. 2001-A, at page 2033-A. Government Exhibit 2001 comprises a set of interrogatories served by the plaintiff on the defendant on June 3rd, and answered by the defendant on July 18, 1949. These interrogatories are addressed entirely to the subject of duPont's patents.

Mr. Gesell. Well, now, your Honor, I think we better face up to a problem we are going to have with respect to these interrogatories. We have no objection to the answers coming in provided it is understood that with them come in the patents referred to. These interrogatories are all by way of number and patent number only, and they are unintelligible with the supporting patents which are all before the Court in bound volumes, and if the Court will receive the patents together with the interrogatory answers, we have no objection to the offer of the interrogatories.

Mr. Minicus. I strenuously challenge the statement, your Honor, that these interrogatories are unintelligible without recourse to the substance of the patents themselves. The Government is only proving certain things, and this is still the Government's case. The Government desires to show how many patents the duPont Company owned. We don't have to read 400 odd patents to find out how many patents they own. The number of patents they own is stated in here.

5405 The Government is also interested in a later date here in certain licensing arrangements that the duPont Company engaged in. I don't think to find out whether a particular license violated the law it is necessary for us to look into the substance of the patents. These interrogatories, your Honor, set out the patent numbers, the date of their issue, the name of the inventor, the particular commercial designation, whether it was commercially used, the date of assignment or license, whether acquisition was by license or assignment, and also such other information concerning litigation in which particular patents had been involved. We are interested in that; but I think it would unnecessarily encumber the plaintiff's record to interject all of these 400 odd patents into the record at this time, and we don't see how our reluctance to put these patents in can in any way inveigh against the admissibility of these interrogatories.

The Court. May I make an inquiry? Are the patents contained in the four volumes of patents which Mr. Pollard has just brought into the courtroom also found in the list in the interrogatories?

Mr. Gesell. They correspond, your Honor.

The Court. They correspond? Have those four volumes of patents gotten into evidence?

Mr. Gesell. No; they are not in evidence.

The Court. Who presented them?

5406 Mr. Gesell. I presented them to you at the opening of court under a stipulation which appears reproduced on the front page of the top volume, which your Honor may wish to refer to.

The Court. Yes.

Mr. Gesell. But as I read that stipulation, your Honor, it does not move the patents into evidence. We have agreed as to the bundles of patents, as it were, under that stipulation.

The Court. Well, I think the statutory provision whereby I have to take notice of patents issued by the Patent Office——

Mr. Gesell. The decisions are clear that you can take notice of patents.

Mr. Minicus. That is absolutely right, your Honor.

The Court. So I don't know whether you are arguing about a mechanical difficulty or not. If it is, let us not waste any time about it, because the patents are here. If you want to direct my attention to them, I am going to read them, and therefore I don't think we have any problems.

Mr. Gesell. If the record shows that your Honor will take judicial notice of the patents in these volumes for the purposes of this suit, that is my only point.

The Court. I shall so take notice.

Mr. Minicus. They are offered in evidence, 2001 and
5407 2001-A.

(The answers to plaintiff's interrogatories dated June 3, 1949, were received in evidence and marked "Government's Exhibits 2001 and 2001-A," respectively.)

Mr. Minicus. I would like to dispose of 2001-A first, simply because it is nothing more nor less than amendments submitted by the defendant to the plaintiff on its original answer to our interrogatories and came at a later date.

Government Exhibit 2001, on the other hand, has material that I would like to deal with for a moment at this time. Interrogatory 1 of this exhibit, which is sub-divided into sub-divisions A through F, makes inquiry addressed to the number, general nature, and means of acquisition by duPont of rights under patents relating to cellophane and caps and bands. In the main, the substance of the answer to these inquiries is found in Schedule A of 2001 which commences at page 1978.

Now, Schedule A, beginning at page 1981, purports to list all patents relating to cellophane and caps and bands under which duPont had rights at the time of answering the interrogatory or prior thereto.

The Court. Can you tell me in substance, Mr. Minicus, the number and the year range?

Mr. Minicus. Would you have that immediately or
5408 would you take it in my presentation as it comes?

The Court. I just want to make a note within my framework in which I have to place these things in mind.

Mr. Minicus: There are 395 patents under which duPont has rights. The patents listed in Schedule A began to issue prior to duPont's entry into the industry. They were either licensed or assigned at the time of duPont's entry, so that the first would come along in 1923 or 1924, as far as the schedule is concerned. Of course, the plaintiff is not referring herein to any patents that either issued or were licensed after 1947, although some appear in here.

So with that qualification, taking count of that, we found 395 patents listed here under which duPont had rights.

Mr. Gesell. If your Honor please, may I rise on this just to keep the record clear? Here is another case where the interrogatory goes beyond the date of the complaint. There is, therefore, throughout these tables applications and patents which were filed subsequent to the date of the complaint, or applications filed prior to the complaint becoming patents after the complaint, patents that were in existence before and expired afterwards, and so forth; and I think we should have some clear indication from Mr. Minicus of just what portion of this he is including. Does he mean to include applications filed prior to the date of the complaint that have matured into patents or
5409 does he include those patents, too? I am just confused as to what we have before us, and it bears on these statistics, because we are both going to have counts, I suppose, of what it shows.

Mr. Minicus. I submit, your Honor——

The Court. Don't submit anything. Just tell me what you are relying on.

Mr. Minicus. Our position is simple. We have as a cut-off time all rights acquired by duPont under patents after 1947. Now, I don't think that is difficult. If duPont filed an application for a patent on January 2, 1948, we are not relying on that in this interrogatory. If duPont filed an application as of January 2, 1946, that matured into a patent sometime in 1948, we accept it as a pending application as of the time of the filing of the complaint.

Mr. Gesell. Does that mean that I can refer to that patent?

The Court. Of course, you could not truncate a patent by saying I am going to listen to part of the evidence which relates to the original filing and anything that occurred that appears in the file wrapper with respect to the granting or rejecting of certain claims, and then stop. You can't do that. You have to hear the whole history of that patent if it is going to be referred to in any respect.

Mr. Gesell. So that if the application is in prior to the
5410 complaint date, we carry on with respect to that into the patent period. I think that clarifies it.

The Court. That is my present view.

Mr. Minicus. Without waiving our position as to this date, we have no objection to that.

The Court. Very well, proceed.

Mr. Minicus. Now we turn to page 1981. We will note that Schedule A is presented in a number of columns across the page. In the first column beginning at the left hand margin we find a series of numbers running from 1 sequentially on. These are merely arbitrary reference numbers selected by the duPont Company in answering the interrogatory, although at various times thereafter that particular patent will be referred to by the defendant under this reference number, I believe.

Moving to the right from the first column we come to the particular patent number in the order in which it was acquired by the company.

The next column shows the date of issuance, I believe, in the case of issued patents, and in the case of application, the date of the filing.

The fourth column presents the name of the inventor of the particular product.

The fifth column purports to show the classification of the patent, whether it is product, process, composition, article of manufacture, or machine.

5411 The sixth column in some cases shows a trade name or commercial designation for that patent or the product under it.

The seventh column indicates whether or not that particular patent has received any commercial use of any kind, although the extent of the commercial use is not set forth.

Now, if the patent rights were acquired either by license or assignment, column 8 will designate that fact; and column 9 will set forth the name of the assignor or the licensor.

The final column, column 10, shows whether, if it were a license, it was an exclusive license or non-exclusive license.

So in Schedule A we have a pretty complete compilation of all the patents under which duPont acquired some or another type of right during the period covered by the complaint.

As to the over-all composition of Schedule A, it will be noted that reference numbers, the numbers on the left hand column, reference numbers 1 through 249, set forth patents acquired by the defendant on inventions developed through its own research. Past reference No. 249, which is at page 2006, and beginning at page 2007, we find beginning with reference No. 250 a series of duPont's pending applications at the time of the inter-
5412 rogatories, which were applications for patents on inventions developed through their own research. That runs through reference No. 270 at page 2009.

On page 2010 we begin a list of patents assigned or licensed to duPont since 1920. That continues—the reference numbers have been omitted on this page, although there is no break in the continuity; they go right on through. Reference numbers 271 through 416 set forth patents acquired by duPont either through license or assignment from sources outside the duPont Company; and then we come to reference No. 417 through 420, representing applications acquired from sources outside the duPont Company.

Now, as I have pointed out to your Honor, that within the time restrictions just discussed we found that there were 395 patents in here under which duPont had rights. Schedule A also shows that there were 245 patents on inventions developed within the duPont Company; that there were 150 patents acquired from sources—that is, rights under patents acquired from sources outside the duPont Company. Of that 150, fifty-nine patents were acquired by assignment, 26 patents were exclusively licensed to the duPont Company, and 65 non-exclusive licenses are represented.

5413 Of these rights acquired from others outside of duPont Company under patents, the table also shows that 65 licenses or assignments were acquired from the co-conspirators or the Sylvania Corporation—that is, rights acquired from sources outside the duPont Company, 62 of them were acquired either from the co-conspirators—that is, the foreign manufacturers of cellophane named in the complaint: La Cellophane, B. C. L. Kalle, Viscose Development Limited, Viscose Francaise—62 of the rights were acquired either from them or from Sylvania.

Column 7, as I mentioned before, designates whether the patent ever was subjected to any commercial use of any kind. The extent of commercial use is not indicated.

Mr. Gesell. That is not accurate, Mr. Minicus, and I am sure you didn't mean that. It is commercial use by duPont. This contains no reference to use by others.

Mr. Minicus. That is quite true, your Honor. I was speaking of duPont, commercial use by duPont, speaking of duPont's rights.

We will note that of the 395 patents or rights under patents which we stated comprises duPont's patent estate, of those 395 only 111 of the patents or rights or only 111 of the patents were ever commercially used by the duPont Company; of the 245 patents owned by the duPont Company as a result of their own development, of those 245 only 79 were ever commercially used by the duPont Company to any extent, and we don't know what the extent of commercial use was.

5414 I consider extremely interesting the fact that duPont took assignments under 59 patents. In other words, they went out to somebody else outside the duPont Company that acquired a patent on the invention of maybe one of its employees, or somebody else, and for some reason or another they took an assignment of that patent—not a patent developed by their own research at all. And of those 59 patents they only subjected 12 to any commercial use. I wonder why they were acquired. That is twenty per cent only of all the patents they acquired by assignment that were ever subject to any commercial use.

Now, under the patents whereby rights were acquired through exclusive license, we found that there were 26 patents under which duPont had an exclusive license. Only two of those ever were subjected to any commercial use. Then of rights acquired through non-exclusive licenses, 65 patents, only 19 were commercially used by the duPont Company.

In recapitulation of all the patent rights acquired by this defendant from sources outside of the duPont Company, of which there were 150, only 33 were ever commercially used to any extent.

The plaintiff recognizes that the patent laws of the United States, differing from those of foreign states, impose no obligation of user upon a patentee. However, this is not a litigation for breach of any of the patent laws but presents another issue,
5415 whether the defendant has monopolized the manufacture and sale of cellophane and caps and bands. In resolving such an issue, facts pertaining to the relative number of patent rights acquired by participants in the industry are indicative of the distributive shares of the technological control.

Mr. Gesell. Could I have that again, please? That apparently is the main issue.

(The Reporter read the following:)

"In resolving such an issue, facts pertaining to the relative number of patent rights acquired by participants in the industry are indicative of the distributive shares of the technological control."

Mr. Minicus. Likewise, the fact that the dominant unit in this industry, the dominant manufacturer has commercially used only about one out of every four patents or rights under which it has brought within its control, we believe to be probative in light of other facts of the intent accompanying acquisitions of the patent grant.

We also assert that this probative value is enhanced by the non-use of almost four out of every five patent rights acquired from sources outside of the duPont Company.

Moving now to interrogatory No. 2, Interrogatory No. 2 inquires with regard to the patents under which duPont has rights, whether they have been involved in litigation in the Federal Courts. The answer to this interrogatory is found in Schedule B, commencing at page 2027. Schedule B sets forth
5416 the patents listed in Schedule A which have been involved in litigation in the Federal Courts, and this is more directly responsive to your Honor's inquiry of a few moments ago.

We find there listings according to reference numbers of the patents involved, the Court in which the suit was instituted, the title of the action, the date of filing of the initial pleading, and the result of the litigation.

The Court. Where is that?

Mr. Minicus. Page 2028.

The first ten listings there, you will note, involve the Sylvania Corporation as a party defendant, and these listings are all part really of a single litigation growing out of a single subject matter, namely, the moistureproof patents. It will be noted in the right-hand column opposite all these listings that the litigation was dismissed by stipulation without trial. We will discuss that subject matter in detail under the next major heading of our case.

The next three listings then are on page 2029, opposite reference numbers 283, 283 and 295, and present litigation which involves certain ribbon patents, patents on a ribbon-like material made from cellophane. These will also be considered in detail at a subsequent point, and it will be noted there that the defendant was the Hy-Sil Manufacturing Company, which the evidence shows was a fabricator for the Sylvania Corporation. There is one
5417 other defendant in the second reference, the Lustro Ribbon Company. It will be noted that in that litigation a consent decree was entered and an injunction served. We will see how that came about, your Honor, at another point.

The final four listings involve certain patents relating to the sealing of cellophane. They are opposite references 321, 323, 325 and 344, the same defendant in each company, the Vis-O-Tube Company, a customer of the Sylvania Corporation. It will be noted that this litigation was contested, and in the last column on the right-hand side there it will be seen that a great number of the claims under these patents were adjudged invalid. That is the only action that a patent owned by the duPont Company, or under which the duPont Company had rights, was involved in litigation in the Federal Courts of the United States.

Interrogatory No. 3 inquires as to the identity of patents to which duPont has rights which have been involved in inter partes proceedings in the United States Patent Office. The answer to this interrogatory is found in Schedule C, commencing at page 2030. Schedule C sets forth the patents under which duPont has acquired rights which at one time or another have been involved in inter partes proceedings in the Patent Office. It will be observed that this section sets forth 40 Patent Office interference proceedings. Of this number, 21 interferences were settled by agreement. This matter will also be considered in greater
5418 detail at a subsequent point under the patent section.

Now, Interrogatories 4, 6, 7, 8, 9 and 10 constituted an attempt by the Government to obtain admissions from the defendant relating to the status of the art in the United States of the products involved. In the opinion of Government counsel these interrogatories did not meet their intended purpose. In our opinion we felt that several of them were not responsive to the questions presented, but we did not pursue the matter further because we felt that the documents earlier presented to the Court this morning resolved the problem sufficiently for our purposes.

Interrogatories 11 and 12 set forth certain facts relating to various trademarks owned at different times by the defendant company, and I am not going to belabor that subject matter at this time.

Mr. GESELL. Your Honor, in this connection I wonder if we can work out some procedure for correcting your Honor's copy in order to put the amendments on to one copy. They refer in many cases to minutiae. If we could hand your Honor a corrected set and a copy to the Government that would show that, it might save confusion later on.

The COURT. That will be very satisfactory.

Mr. MINICUS. I would like to introduce in evidence at this time Government Exhibit 403. This exhibit comprises Book 33-A of the Government's offer in evidence. 5419 Government Exhibit 403 is an answer to Interrogatory No. 11, a second set of interrogatories served by the plaintiff on the defendant on March 9, 1950, and answered by defendant on May 15, 1950.

(Answer to Interrogatory No. 11 was received in evidence and marked "Government's Exhibit No. 403.")

Mr. MINICUS. I might present the usual caveat that the Government does not rely upon any licenses contained herein which were granted subsequent to December 13, 1947, nor have any such been utilized in the analysis of this exhibit that we are about to present. Your Honor will note that this exhibit contains a great number of pages and that there is some typewritten material on each page. Each page represents one particular license granted by the duPont Company—in other words, a one page resume of all of duPont's licenses are in this exhibit, that is, licenses under United States Letters Patent.

Mr. GESELL. That is only as to cellophane.

Mr. MINICUS. That is right—we might say caps and bands, too.

Now, within the time limitation covered by the period of the complaint, 250 patent licenses have been granted by duPont. Of these, 95 patents have been licensed to Sylvania, and of that 95, 82 passed under a moistureproof agreement which we shall shortly introduce—82 out of 95 passed under the moistureproof agreement. Four of the 95 patents licensed to Sylvania passed 5420 under various caps and bands agreements. Five passed under a certain ribbons agreement, to be discussed. One passed under an ultraviolet light protective film agreement, to be discussed. And three passed under miscellaneous agreements which will be discussed. Colon has been licensed under five patents reading on caps and bands. The Visking Corporation has been licensed under four patents for sausage casings. Capes Viscose, U. S., the predecessor of the duPont Company in the caps business, was licensed under three patents for sausage casings.

Now, of the remainder of the patent licenses granted by the duPont Company we shall see that of the balance of the 250, 95 from 250, we shall see that they were licenses to purchasers of duPont cellophane in the converter class, purchasers of duPont cellophane in the fabricated group, purchasers of duPont cellophane on direct purchase, and certain non-purchasers of duPont cellophane.

The Government will have recourse at various times to this exhibit and aside from the statistical information just divulged, our main purpose of the exhibit will be for reference.

5421 I would like to briefly allude, if your Honor please, to certain policies and practices that the Government has found existed with regard to defendant's acquisition of certain of these patent rights. The documents about to be introduced in evidence are merely illustrative. The Government does not consider the list exhausted, but contends as to these particular patents here that they exemplify certain practices and intent accompanying acquisition by the defendant of many of its rights under patents.

The first document I would introduce, if the Court please, is Government's Exhibit 323 at page 835. This exhibit has previously been introduced, your Honor.

Mr. GESELL. It is in once.

Mr. MINICUS. This document was introduced into evidence just the other day. There has been considerable discussion about it. I am not going to belabor it. I would simply refer to the fourth full paragraph on the page where we state that at that time duPont's patent policies were fairly well announced with regard to the acquisition of patents. This is a letter of March 14, 1933, from Mr. L. A. Yerkes to Messrs. Farmer and Hatt, of the duPont Company. The third paragraph states:

> "I don't know just what the Cohoe patents are, mentioned on page 8 of Hatt's letter, but I quite agree that if Cohoe has
> 5422 patents which would improve our patent position, they should be looked into, and if they do show promise of being valid and do show promise of giving us a monoply in the manufacture of bands, and if furthermore they can be bought for a reasonable price, this should by all means be done."

Mr. GESELL. You are not contending that they were bought, are you?

Mr. MINICUS. I am not.

Mr. GESELL. They were not.

Mr. Minicus. I am simply using that document to illustrate what we consider to have been one of the motivations for duPont in acquiring patents.

Now, Mr. Gesell said that this letter was written 17 years ago, or something like that. I don't know what that statement means. It is our position that this business of monopolization was very, very active 17 years ago, and it is the result of those activities in the early '30's and beyond that have given us this dominant structure that we have in the cellophane industry today, and I maintain it is not material when this statement was made.

The next block of documents that I desire to introduce are Government Exhibit 2017 at page 2075, 2018 at page 2077, 2019 at page 2078, 2814 at page 6080, and Government Exhibit 2815 at page 6084.

5423 (The papers referred to were received in evidence and marked "Government Exhibits Nos. 2017, 2018, 2019, 2814, and 2815," respectively.

Mr. Minicus. The Government submits that these documents illustrate a fairly common practice in the duPont Company of causing patents to be issued at a time when duPont intended that there would never be any commercial use of the patents, and in fact such patents never have been used commercially by the duPont Company.

The next group of documents that I would introduce, your Honor——

Mr. Gesell. Wait a minute. When are we going to get a break in this dumping process, your Honor, so that we can give you the evidence? Have you got some kind of a break coming along here?

Mr. Minicus. It will be a little while.

For your discussion?

Mr. Gesell. Yes.

Mr. Minicus. There is a break. You could have come up at any time, Mr. Gesell. I am always glad to step back and hear you.

Mr. Gesell. Well, I don't reciprocate about that, but where do you want me to break?

The Court. I am going to take a recess in a moment and you can work out that plan. I just want to finish my notes.

5424 Mr. Gesell. All right, your Honor.

The Court. We will take our mid-morning recess of 10 minutes.

(At this point a brief recess was taken.)

Mr. Minicus. The Government offers in evidence the following exhibits: Government Exhibit 2026 at page 2087; Government Exhibit 2816 at page 6082; Government Exhibit 2029 at page 2092;

Government Exhibit 2817 at page 6083; Government Exhibit 2818 at page 6040; the Government offers also in evidence Government Exhibit 2035, at page 2101; the Government offers in evidence Government Exhibit 2036 at page 2103; Government Exhibit 2826 at page 6094, the Government offers in evidence Government Exhibit 2839 at page 6115; and the Government offers in evidence Government Exhibit 2840 at page 6116.

(The papers referred to were received in evidence and marked "Government's Exhibits 2026, 2816, 2029, 2817, 2818, 2035, 2036, 2826, 2839, and 2840," respectively.)

Mr. MINICUS. The plaintiff maintains, your Honor, that this series of exhibits illustrates the defendant's practice of causing patents to be issued which they did not at the time of their issuance intend to use, and have not in fact used. The documents es-
5425 tablish that the primary purpose for the issuance of these patents was to block the efforts of other inventors in the field, to develop their patents for their trading value, to establish a defensive patent position through fencing, and generally to accumulate a great mass of patents, the claims of many of which amounted to trivia.

The Government offers in evidence Government Exhibit 2819, appearing at page 6085, and Government Exhibit 2820 appearing at page 6086.

(The papers referred to were received in evidence and marked "Government's Exhibits No. 2819 and 2820," respectively.)

Mr. MINICUS. The Government presents these two exhibits, your Honor, as a specific instance relating to the acquisition by the defendant of rights under the patents in which collusion was engaged in with one of the foreign co-conspirators. There was a discussion for the purpose of acquiring a patent and an application on a German invention wherein the discussion was concerned with the filing of the application of this country outside of the Convention period. The facts here were that duPont, desirous of obtaining a United States patent on a Kalle invention after the Convention period had passed, considered soliciting the Germans to delay issuance of the patent and in the interim to speed up prosecution of the application through the United States Patent
5426 Patent Office so that the United States patent would issue prior to the German patent.

The Government offers in evidence Government Exhibit No. 2821, at page 6087, and Government Exhibit 2822 at page 6089.

(The papers referred to were received in evidence and marked "Government's Exhibits Nos. 2821 and 2822," respectively.)

Mr. MINICUS. This is another instance of collusion, your Honor, with one of the foreign co-conspirators in this case. In order to acquire a United States patent on a Kalle invention duPont promised Kalle to delay issuance by the Patent Office so that publication of the invention would be retarded.

The Government offers in evidence Government Exhibits 2823, and 2824. Exhibit 2823 appears at page 6090; 2824 at page 6092.

We also offer in evidence Government Exhibit 2825, appearing at page 6093.

(The papers referred to were received in evidence and marked "Government's Exhibits Nos. 2823, 2824, and 2825," respectively.)

Mr. Minicus. These three exhibits are merely illustrative of a customary procedure followed by the defendant in connec-
5427 tion with acquiring rights under patents on the inventions of co-conspirators. It will be noted from these documents that when duPont took an assignment which is intended to convey the right, title and interest--the entire right, title and interest to the patent, there were certain equitable rights that did not pass with the acquisition of the patent by the duPont Company. Certain rights were retained by the co-conspirators.

The Government offers in evidence Government Exhibit 2053 at page 2127, Government Exhibit 2054 at page 2128, and Government Exhibit 2055 at page 2131.

(The papers referred to were received in evidence and marked "Government's Exhibits Nos. 2053, 2054, and 2055," respectively.)

Mr. Minicus. Here, again, your Honor, we have a reflection of duPont's relations with one of the foreign co-conspirators, in this instance British Cellophane Limited. It will be noted from these documents that when duPont received notice of the British invention and a copy of the British application, that prior to filing that invention in the United States Patent Office, an application on that British invention in the United States Patent Office, that duPont took upon itself to re-write the specification on the invention and thereby extend its patent monopoly beyond the original claimed invention in England. It is noteworthy in these documents that duPont admits that it had done no prior actual work on this particular invention.

5428 The Government offers in evidence Government Exhibit 2841 appearing at page 6117.

(Letter from G. F. Goodyear to C. F. Daley, dated July 2, 1934, was received in evidence and marked "Government's Exhibit No. 2841.")

Mr. Minicus. This document, your Honor, presents another aspect of the patent relationship between duPont and the foreign co-conspirators, this time on a French invention, and here again we find the broadening of the French application for the purposes of filing an application on that French invention in the United States—very similar to the previous situation.

At this point, your Honor, I would like to retire for purposes of turning the lectern over to Mr. Gesell.

Mr. GESELL. Your Honor, I think we have had tendered to us, albeit in very brief form, a number of issues, and I think the best way for me to deal with them is to proceed more or less in the order that Mr. Minicus took each of them up.

The first discussion related to the question of whether or not this was a "dead horse," and since everyone seemed to agree this is a "dead horse," this aspect of the case, I don't suppose there is any need of comment from me, except to point out, your Honor, that with respect to these patents not only is no relief being sought, but such patents as do exist today are available to anyone who wants them in the business.

5429 We are critized because of the number of patents we have, as I understand this presentation, and we are criticized because we have spent vast sums on research, which of course was a necessary prerequisite to obtaining many of the patents. Those are two issues that I think we ought to reach head-on.

As far as the number of patents is concerned, here we have a group, as we count them, of 414 patents. Well, is that too many patents for the cellophane industry? I know no way of testing that. And it seems to me that to bear down so heavily on the number has no evidentiary value whatsoever.

The Supreme Court, as your Honor is aware, in a case involving the radio industry with Sherman Act aspects in the last term of Court dealing with 570 some patents and 200 applications there said, "The mere accumulation of patents, no matter how many, is not in and of itself illegal.

What is there in the fact that we have 414 patents in the period that has been chosen by the Government here for study which has to be defended? And particularly I ask that when it is obvious from the count that the Government made and from our own count that the bulk of those patents were patents which were awarded to duPont based on its own invention.

The patents are valid, and that is undisputed, and there is not
to be any attack on these patents apparently. Not only can
5430 there not be on the case of the Government in chief but
we have been served with no rebuttal exhibits citing prior
art or raising questions of validity, and they are long since
overdue.

So we have here, to be sure, 414 patents, all of which are valid, and the bulk of which were obtained by duPont as the result of its own invention.

The COURT. What was that number you just stated?

Mr. GESELL. 414 is what I count them to be.

The COURT. Very well.

Mr. GESELL. I am counting patents and applications, your Honor.

The COURT. I understand.

Mr. GESELL. ——of which we show that 238 are cellophane patents of duPont's own invention.

Now, if those patents are valid patents, and if they were acquired as the result of duPont's own ingenuity and invention, and if, as the Supreme Court says, mere number of patent does not mean anything, certainly our inquiry has to go much further than the inquiry as it was presented by Mr. Minicus.

Fundamentally, I think we can show that his attack is on research. His is an attack against any company which spends sums of money to find out new things and places those new things in the public domain by the patent law.

It is undisputed that duPont conducted research of a very extensive character here over many, many years, that 5431 substantial sums were spent for it, as these exhibits show, and that from that expenditure came new ideas which were patented.

Judge Knox in his opinion, which has been referred to here this morning, was very careful to point out his great concern that nothing he should do in that case should place any damper on the research initiative of the Aluminum Company, and nothing should be done in this case which places any damper on the research initiative of duPont. And when we get all through the shouting, I think we are going to find that that is the evil that the Government sees and that it wishes to eradicate—successful inventing.

First let's deal with the question of the status of the art, which is the next subject that Mr. Minicus came to. It as apparenly the Government's contention that plain cellophane is an open art and that anyone at any time could have manufactured plain cellophane without rights under duPont's patents. We agree with that. There has never been any issue about it, never been any question about it. Anyone who wanted to could manufacture plain cellophane. Well, if that is the case, what is all the shouting about the number of plain cellophane patents doing in this case at all? As the Government urges, and as we recognize, anyone could make plain cellophane. Some 180 of these patents, if your Honor please, relate to plain cellophane, and I am at a loss to see what the issue is. The only one that I can 5432 find is one as to whether or not duPont sought to enforce its plain cellophane patents for the purpose of excluding competitors, because these documents show that many of them were considered pretty weak and that the art was open. Well, all of the evidence that we went over today was evidence showing that duPont did not enforce those plain cellophane patents.

When the exhibits first came in many weeks ago in this case, they were presented to your Honor as bearing on the question of the aggressive use of patents as an offensive weapon. But how about that? On three different occasions to which Mr. Minicus pointed the question was reviewed as to whether the plain cellophane patent protection was such that some steps should be taken with regard to competition, first from abroad and subsequently at home, and on all occasions the decision was reached not to seek to enforce such patents as there were. So how from that can you find that there was an accumulation of a mass of patents for the purpose and with the intention of preventing others from getting into this business?

The second point relates to moistureproof, which was conveniently mentioned and then never discussed again in the presentation. As to moistureproof, your Honor, whereas you will have seen from the trial memoranda that were submitted during the last recess, and as Mr. Minicus conceded, duPont had broad product patent coverage, well, if that single patent, the basic moistureproof product patent enabled duPont, if it chose to,
5433 as a matter of law to exclude all imports and all competitive manufacture of the product in the United States, as that single valid product patent did, then what is there to all this other discussion about numbers of patents being accumulated or developed or sought for the purpose of excluding others? That just could not be the fact because in this case the basic product coverage existed.

Many of these patents were in the moistureproof area. I have told your Honor there were some 180 relating to plain and there were some 200 relating to moistureproof. Now the next question presented, as I got the argument, was that moistureproof was merely an improvement of plain cellophane. Well, the Patent Office didn't think so, and the patent doesn't so read. It was a separate distinct product patented as such and no more an improvement of plain cellophane than rayon was an improvement of plain cellophane. And the existence of this basic product patent cannot be avoided. Its scope on the issues as tendered by the Government cannot be narrowed or its validity challenged.

So the fact which is not established in the record but is constantly reiterated by the Government, that cellophane was well known before 1900, has nothing to do with the case. Eighty-five per cent of this business and eighty-five per cent of this industry as defined by the Government is all moistureproof cellophane.

DuPont has never claimed credit for inventing cellophane,
5434 that is, claim cellophane, though it certainly improved it.

It has claimed, and the Patent Office records show that its claim is accurate, that it did invent the new product, moistureproof cellophane. And all this discussion about the open art relates to plain cellophane, a different product, and to conditions that existed as to that product before the discovery of moistureproof.

Brandenburg's basic invention was in 1911 of the plain cellophane, and many of those early patents were expiring at the time Du Pont entered the business.

Mr. **Minicus.** Do I understand that statement to mean, your Honor, that Mr. Brandenburg invented cellophane in 1911?

Mr. **Gesell.** Mr. Brandenburg's patent issued to him in 1911 on plain cellophane.

Mr. **Minicus.** Does that patent read on plain cellophane, your Honor, or does it read on an apparatus or process for manufacturing plain cellophane?

Mr. **Gesell.** All of this discussion, your Honor, about prior art and open art was not concerned with the core of this case at all.

To take the other end of that discussion for a moment, the letters that indicate that after the war duPont recognized there were no longer secret processes, those letters in '44 and '46, after the Germans had tramped through the French cellophane plants, have nothing to do with the question of whether, throughout
this period from its invention until the complaint,
5435 moistureproof cellophane, a distinct product, the important
product of this industry, was covered by a valid product
patent.

5436 Now, your Honor, I would like to deal with the question of non-use, which is the next issue tendered on this problem.

First of all, it was tendered inaccurately as a statistical matter, and I guess we better clarify that. If you include in the patents, as Mr. Minicus did, all of the customer use patents, of which there were quite a number, and then charged duPont with not having used the customer use patents, of course, he gets a more convenient statistic from the point of view of his case.

Of course, duPont did not itself use a patent that it may have invented for a converter covering a bag closure, which is one of the examples that was given to the Court; and if you take those patents out the statistics change a bit, and instead of showing 25% use, show more in the neighborhood of a third or better use.

I submit to your Honor that is an extraordinary large use of patents. It is larger than the chemical industry; it is larger than industries generally, and it is very substantial—

Mr. **Minicus.** May I ask for some evidence to substantiate those statements, your Honor?

Mr. GESELL. And if your Honor will consider the literature bearing on the subject of patent use in American industry
developed in the proceedings of the T. N. E. C. and the
5437 publications of the Patent Office and elsewhere, it will be
apparent that this was a substantial commercial use by
duPont of its inventions.

But what I would like to inquire into are the reasons for non-use, and the explanations as to that, if the Court please, are not only quite simple but well recognized when the operations of American business are considered in the light of the rules and requirements of the Patent Office. What I think Mr. Minicus and his colleagues—and I must confess, sometimes the courts—constantly overlook with respect to this issue, your Honor, is the enormous gap which exists between the discovery of the invention as a matter of research and the development of the invention into an invention which can be applied commercially to plant operations. That lag existed in moistureproof. It took several years from the time of the invention until plants could be constructed and processes improved to manufacture commercial at a profitable basis, and at the time an invention is made the extent of its potential commercial use, indeed its value, is most uncertain. It is a matter of public record that in the case of nylon the time passed from 1928 to 1935 between the conception of the invention and the development of a satisfactory commercial product. But from the Patent Office point of view, if your Honor please, it is necessary
to patent immediately, the inventor must show diligence
5438 between conception and filing, and he certainly must do
everything in his power to prevent becoming a junior party
in an interference where difficulties of expense and time are placed upon him unnecessarily if the invention was his.

So it is natural, I say, and not indicative of a monopolistic purpose, for any forward-looking, research-minded American company to be in possession of United States patents of its own invention that are not used in its commercial operations.

We have seen what a developing art we have here. These patents, if your Honor has an opportunity to examine them later, will show patenting of alternative raw materials, patenting of alternative process steps in some cases, and as this art developed frequently new and better ideas came along which supplanted the idea for which a patent has been obtained. One coating proved to be better than another, although at the time the first patent was secured no one knew that another discovery was on the way.

In that connection, your Honor, may I call attention to the fact that the exhibits introduced show very substantial licensing by duPont of its patents. Some 340 separate licenses are shown in

the interrogatory that was introduced, and I ask your Honor to
look closely for evidence of refusals to license.

5439 The COURT. Why if there were 340 separate licenses, were
there only two potential competitors? I can't square that.
Celon and Sylvania.

Mr. GESELL. Who is it that won the license to manufacture moistureproof cellophane that didn't get it, your Honor?

The COURT. You are asking me? I don't know.

Mr. GESELL. I don't, either.

Mr. MINICUS. I believe we have some evidence on that point that we will introduce during the patent section, your Honor.

The COURT. It is 1:00 o'clock. We will recess until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m., the same day.)

2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. GESSELL. Your Honor, I was just coming to a discussion of the charge made by Mr. Minicus as to blocking and fencing. Now, as I understand it, blocking —

The COURT. Does that mean blocking in the sense of
5440 football? I know what fencing means.

Mr. GESELL. Blocking is to take out patents for the purpose of preventing some one else from developing their invention. Another fellow comes along with an idea that turns up in a patent and you set to work in effect to fence him. You are blocking. Whereas "fencing" is building up around your own preferred process or technique patents covering alternatives which will prevent others from invading the area; and I gather that that is what we are charged with having done.

By way of a preamble, your Honor, I know of no case that says that blocking and fencing is a violation of the anti-trust laws. Your Honor may recall that the only litigation where the issue arose at all was in the Hartford Empire case, and there the Supreme Court struck out the lower court's decree insofar as it prohibited blocking and fencing as therein defined. But certainly if it is a relevant consideration in this case, it is a consideration that goes to intent, because every patent that a man takes out has an exclusionary effect, and since we are dealing here entirely with a group of valid patents there has to be something more than just patenting shown or patenting accompanied by non-use to establish the charge of blocking and fencing. If the Government can show on these documents the kind of thing that turned up in the Hart-
ford Empire case, where men sat down and planned on a sys-
5441 tematic patenting program to go out and prevent a
competitor from engaging in a particular line of business

or a fencing action within duPont itself intended to exclude competitors, then we would have proof that had some pertinence in a monopoly case. But if the patenting which the Government says is blocking and fencing came about for some other reason in the normal business of the company, and not with the intention of blocking or fencing, then we have certainly just another example of irrelevant material which the Government is attempting to mis-emphasize or mislead.

I think here the difficulty between us and the Government comes about because of the use in these documents—and your Honor will find it in many of the documents that were covered today—of the term "defensive patents." You will see in these duPont documents references to defensive patents, and looking at Mr. Minicus' groupings and emphasis of these documents, he seemed to light upon that term as proof of his blocking and fencing charge.

5442 If I may refer to one exhibit, I think I can indicate how erroneous a misreading that is of the material. Exhibit 2821 at page 6087 I think is directly in point on this issue. The document there says:

"We appreciate fully the basis for your request and we frequently have similar circumstances in the United States. It is quite true that there are certain types of inventions which, if published through the medium of an issued patent, can be used by competitors without our being able to detect infringement and we agree with you that this invention belongs in that class. We should like to say, though, that the fundamental reason why we file patent applications for our inventions is to prevent others from deliberately or accidentally filing an application for the same idea, securing patents and thus preventing us from enjoying the benefits of our own research. It may be true that others will infringe our patents because they believe we cannot detect the infringement, but it is not true that we infringe the patents owned by others on the same basis. It is therefore necessary for us frequently to file applications for our researches in order that we may feel secure in exploiting them although we fully realize that we may be in effect publishing a valuable research without being able to control its exploitation."

That is defensive patenting, the taking out of patents on
5443 legitamate bona fide inventions as they occur in order to
prevent someone else from patenting the invention and thus
depriving duPont of the fruits of its research. It is simply another expression, if the Court please, of the Mason Hepburn doctrine, which I am sure has been before the Court in other litigations, and of the decision in such cases as the Metallizing Engineering Company vs. Kenyon case, and the recent Supreme Court

case, Electric Storage Battery vs. Shimadzu, all of which recognize that under various circumstances someone who is not the first inventor can obtain a patented right to the invention and deprive the first inventor of his invention, a practice which the patent applications show was indulged in extensively in the chemical business by I. G. Farben following the First World War.

And there are documents here that show instances where duPont had one of its own inventions taken from it by someone else where it failed to take out the patent.

You can read these documents and you will not see discussion of intent to exclude others but merely a feeling on the part of the research people that in the areas of the useful activity and ideas where an invention is made the company should secure the patent protection. And in my judgment they would be derelict not to do so.

What is there in the anti-trust laws or anything else that says that when a man has an idea he cannot get a patent for it?

5444 And if your Honor please, consider how absurd the blocking and fencing notion is in the context of this case where the defendant on 85 per cent of its business owns a broad valid product patent which itself excludes everyone who is not licensed from the manufacture or sale of the product or the use of it in the United States. This is not one of the many cases which Mr. Minicus likes to rely on in his brief, where product patents have long since expired and conspirators are combining alternative processes for the purpose of building up a screen of patents that will prevent people not in the pool from practicing the invention or entering the field. This is the case of a man who continues to own the basic product patent which gives him the full right to exclude. And the fact that for defensive purposes he patented various developments in order to have the freedom to develop fully his own product, not to block or fence somebody else, is a fact that shows no monopolistic intent and is well within the standards of proper business conduct.

5445 Now, if your Honor please, as this patent case proceeds I believe you will notice a continuing desire on the part of the Government to avoid a discussion of the patents. Numbers and characterizations suit their purposes better. But I say to your Honor we must look at these patents and find out in many cases whether the particular invention was really a type of invention that would block or fence, or whether the acquisition was a monopolization of a particular field, as is contended, or whether it was not.

We had a lot of correspondence here today, for example, on the acquisition from one of the foreign alleged co-conspirators of some patents relating to the use of cellophane as cigarette paper.

I think we can all take notice of the fact that cellophane is not used as a cigarette paper; that there is no business in that area, and that there is no interest in using it that I am aware of. How does the acquisition of that particular patent, for example, in any way broaden duPont's basic position under this moistureproof patent? I don't think it does. How does the acquisition of that patent create some problem for a competitor who would not make cellophane for cigarette uses anyhow? This is the very problem, if your Honor please, which came up in the Aluminum case before Judge Knox, and there, as your Honor may recall, the Aluminum
Company alone had some 257 patents, over twice the number
5446 we are talking about here; and Judge Knox had this to say,
after taking the study of the patents:

"From the record before me it is largely a matter of speculation to determine how great a deterrent to further competition the comparatively enormous patent portfolio of Alcoa actually is. As conditions now stand, the burden imposed on Alcoa's competitors has not been shown to be unreasonably heavy, and as to potential competitors, the matter assumes little importance, because other more crucial factors, later to be analyzed, more effectively deter the entrance of new firms into this industry. Nor from my examination of the number and nature of Alcoa's patents or the operations of the aluminum industry in the period under review can I find evidence that Alcoa's patents have served as a means of regimenting this industry. Accordingly, I conclude that Alcoa's dominating position in the patent field does not at present constitute a serious threat to effective competition."

Now, that was a conclusion reached upon an examination of the claims of the patents and the nature of the patents. It was not a conclusion that could be reached and was not reached on the basis of recital of statistics.

The basic moistureproof patent permitted duPont to exclude anyone not a licensee from 85% of the business, and as far as plain cellophane was concerned, talking about patents, your Honor, the Government here this morning conceded that it was open to
anybody.

5447 There are a few miscellaneous matters covered by these
documents which remain and I will briefly turn to them.

Mr. Minicus stated that this was not a litigation for the breach of any patent law, and yet he seemed to me to be suggesting that there were breaches of the patent law. He referred first to a group of documents and said, "Look here, your Honor, if you read these you will see that a foreigner was retaining an equitable right in an assigned patent." Well, the foreigners did in certain circumstances, and I say, What of it? Those patents were assigned under a specific patent agreement that gave duPont specific patent rights for a designated field and nothing else, and in those cases where the patent was broader than the field of the agreement, the foreigner retained his equitable right to practice the patent outside the field. In effect, a license back for the portion of the patent outside the field. Why do we stand condemned for that?

Then he read some documents which he branded as collusive. He didn't read them; he branded them as collusive without reading them, documents where discussions were taking place between people in the duPont patent activity and representatives of foreign concerns concerning the relationship between the filing for a patent here and the Convention date abroad, and it was stated that efforts were going to be made to expedite the obtaining of the patent here so as to come within the period speci-
5448 fied under the International Convention, and that is the practice engaged in daily before the Patent Office, covered by Commissioner rulings, and why shouldn't we engage in it, and why should it be branded as collusive? I say that was normal patent procedure.

Then, finally, we had a document or two that talked about re-writing the specifications of the claims to make them broader than the claims of a corresponding patent filed abroad; and there again the rules and requirements of the foreign patent offices are different than the rules and requirements of the American Patent Office. It is a well recognized fact that broader claims can be secured here in many instances, and the re-writing of the specifications was in no way improper; and as to the new material added, obviously no Convention rights applied. Under the rules of the Patent Office an invention would have to be shown, and since the patent was awarded on those claims it is obvious that invention in fact did exist. So I say that these documents, when your Honor gets an opportunity to read them, show nothing but normal patent practice.

5449 Mr. Minicus. It had been my intention, your Honor, not to read any of these documents. The material contained in them is quite clear, and by simply indicating them to the Court and the subject matter they are intended to cover, I felt that that would be sufficient. However, since Mr. Gesell has read from a small part of one of these documents, I think it is necessary to continue the reading of that particular document. I would like to start reading where he stopped. If you recall, your Honor, the discussion was what was meant by defensive patenting. I will continue duPont's conception of defensive patenting from there. Reading from the bottom of page 6087, Government Exhibit No. 2821:

"This present invention is potentially important to us and we should not like to feel that we may subsequently be prevented from using it by a patent issued covering it to others. We would also like to point out that the prosecution of a patent at the United States Patent Office is confidential between the applicant and the office and that we can file this application and carry it along for a great number of years without it becoming disclosed. If, after the claims have been allowed, it seems desirable not to issue the patent, we can then abandon it with no disclosure to the public and in the meantime we will have had the firmer security of a filed application to fall back on if activity of others in this direction is apparent."

5450 Now, your Honor, I ask you, is that dedication to the public in return for a 17-year grant of an exclusive right?

The COURT. I presume that is a rhetorical question. You don't want me to answer it now, do you?

Mr. MINICUS. No, sir.

Now, I see that concessions are apparently moving both ways today. Mr. Gesell now has admitted that there were no patents on plain cellophane worthy of the name. So one thing must be quite clear from that, that these foreign agreements beginning in 1923, whatever else they may have been based on, whether it was a now-you-see-it, now-you-don't joint venture, or whatever else, they were not based on patents, and if some of the cases have held in the past that within the jurisdiction of the patent, that is, within the state issuing it, there can be an allocation of territories, certainly this world-wide allocation of territories did not originate in patents.

As far as processes are concerned, I am familiar with no case that permits allocations of any territories within a state or on a world-wide basis justified by the ownership of a secret process.

If I am correct and if there are cases holding that allocations of territory within a state may be had under a patent, is that not one of the benefits that the patentee acquires by dedicating his property to the public at the end of 17 years? And is it not
5451 true that he does not get such a right under a secret process
because there never has been any dedication?

Mr. Gesell has offered an argument this morning that I seem to have heard before with regard to the basic nature of patents and what a patentee is supposed to get out of a patent and why it is perfectly all right for a large corporation to proliferate a lot of patents and that they cannot tell when those patents are issued what they are going to turn into, and they put a lot of research and money in on it and the patent issues and nobody knows what it is all about. It may take five, ten, fifteen years. I will admit that has happened with some very good patents. There are patents in patent history in which the owner only got five years of commercial use before the patent expired. But that is not the case here. That was not the case for moistureproof cellophane. Moistureproof cellophane was pretty well commercially established by the issue of that patent and our proof will show it later. However, what has that got to do with all of these patents that duPont acquired from sources outside of and independent of the duPont Company that they never used? They never spent the money developing them. They were not even around when the patent issued, but after a while they wanted some rights under it. So 59 times they took assignments and 12 times they used the patent. I don't think that jibes with that argument this morning.

And again, 26 times they took exclusive licenses and twice
5452 they used the patent. Those figures represent 20 per cent
and 4 per cent, your Honor.

Now, if I may continue, I would like to turn to a new section. There has been some evidence thus far presented, and admitted, which is very probative of our position that duPont's market control has enabled its Cellophane Division to realize high and relatively uniform profits. That evidence was introduced through the media of the documents presented by Mr. Renninger, independent of any statistical evidence that we attempted to put into the record.

Now, having come in through Mr. Renninger's presentation, it came in connected with prices. And there seems to be very little doubt that profits and prices have a relationship with each other. And as we start a further consideration of this matter of profits and size and concentration of economic power, I would like to start from the basis of prices.

I would like to pick up the mosaic of a price situation from the broken china of the conscious parallelism where it was left yesterday and set it in its proper setting. We have not started here and worked down and down until we got down here (indicating) and settled for conscious parallelism. It is all part of the same thing, and I think the proof makes that very obvious. We have not settled for any alternatives at all.

A question was raised, what is meant by an arbitrary non-competitive price? What has arbitrary non-competitive prices got
to do with profits? Our first position, as Mr.
5453 Renninger made clear, is that the ability to set a price for
the product that is nation-wide without any considera-
tion at all of the competitive factors is one of the indicia of an arbitrary non-competitive price. A stabilized price is another indicia. In this industry, as far as roll cellophane is concerned, there were two changes in price from 1936 to the date of the filing of the complaint. That covers a period of twelve years.

fish. Hatters' fur, mortician goods, pickles, straw hats, and matters of that kind. What has that got to do with the cellophane case?

Mr. Minicus. I will soon show the connection, your Honor.

Mr. Gesell. It even shows, your Honor, the absence of concentration in ice cream, which meets the old issue that came up in the beginning of this case. But I can't see that it puts us forward at all under the decisions, and I object to it.

The Court. Let me see a copy of the document so that I can follow counsel in their discussion, and I will hear from Mr. Minicus in just a minute.

Mr. Minicus. It is Exhibit 457.

Mr. Gesell. In the International Harvester case, your Honor, a document of this kind was thrown out by the Supreme Court in an anti-trust case where the Federal Trade Commission had made a report.

Mr. Minicus. This is not a Federal Trade Commission report, your Honor; this is the official figures of the Bureau of Census of the United States Government.

5481 The Court. Will counsel please consider the discussion ended momentarily and I will ask a question of Mr. Minicus.

Mr. Minicus. Yes, sir.

The Court. What part of this do you want to direct my attention to?

Mr. Minicus. At the moment I would like to direct your attention to the letter on page 5894 over the signature of Secretary Charles Sawyer, to Mr. Emanuel Celler, telling him exactly what these figures are, that these are figures based on a 10-year census made every year. I think the Court could even take judicial notice of census figures.

Let me read that letter to your Honor:

"In response to your request for data bearing upon the current inquiry of your subcommittee, and as part of a broad study of the problems of competition and monopoly I have recently initiated in the Department of Commerce, my staff has developed a considerable body of information which I am sure will be of keen interest to the members and staff of your committee.

"This information, which is summarized in the accompanying tabulations, shows the degree of concentration of output in each of 452 industries, as measured by the Census of Manufactures of 1947, the latest year for which such a census has been taken. These industry classifications reflect all manufacturing activity in the United States, as classified by the Census Bureau.

5482 The tables show for each industry the proportion of output which was concentrated in the top 4 companies, the top 8 companies, the top 20, and the top 50.

and the Government willingly admits that for about a four or five-year period in that twelve years there were certain general maximum price regulations. But how about the other seven years? And that extended on both sides of the general maximum period. A year after it was over there was finally a price increase. Many years before it came on the price had run along quite stable—in fact, so stable that there were only two changes in twelve years as to roll material.

So the maintenance of a stabilized price, we say, is another indicia of an arbitrary non-competitive price.

Then we point out the matter of the lower price for cellophane in export. Here is a product made in the United States, and that product is sold to people who are going to use it abroad or sell it abroad, or whatever they are going to do with it, cheaper than it is available to the American public. Why should that be? Mr. Gesell justified it; he said there was only a penny's difference—one penny a pound. Now, let's see. About the
5454 time of the filing of the complaint there were about 150 million pounds of cellophane being sold in the United States. At a penny a pound that amounts to $1,500,000. That is a lot of money to anybody.

5455 Then again there was something over and above that penny a pound. This stuff that was being shipped in export, the documents make quite clear, was being shipped f. a. s., freight alongside ship. The domestic cellophane was sold f. o. b. There seems to be a price differential there. That is our third indicia of an arbitrary, non-competitive price.

Fourth, what we maintain are unjustifiable price spreads. I think the documents in many cases show that there was a premium charged for moistureproof cellophane ranging from seven to eight cents a pound above that of plain cellophane, when there was only a one cent difference in the cost of manufacture, and at one time, the particular document that Mr. Renninger read, in that year the duPont Company had been able to manufacture moistureproof cellophane cheaper than they manufactured their plain cellophane. That is our next indicia.

Then the final indicia of what is an arbitrary, non-competitive price is the ability to set the price in the absence of any other considerations than the rate of return that such price will yield. Now, we don't mean by that to say that there is a point at which a price may be fixed to give a certain rate of return, that because that rate of return is so high it is a violation of the anti-trust laws. Not at all. We say anytime you set a price and all you have to think about is the rate of return that that price
5456 will yield, something is wrong with the pricing system; it is not a competitive price if the only consideration is

"This is the first time such a study has been made since before the war. Somewhat similar data were prepared from the Census of Manufactures for 1935. Although industry classifications have changed considerably since the earlier census, it has been possible, for almost one third of the industries listed, to show direct comparisons between concentration ratios in 1947 and the corresponding ratios for 1935.

"While this information does not in itself provide a basis for definitive conclusions concerning the nature or extent of concentration in American industry, I trust it will be of value to your subcommittee in its endeavor to obtain the facts and figures necessary for objective study of this problem."

Then the "General Notes":

"The 1947 Census of Manufactures was the first to be taken since 1939. Present legislation provides for a census of manufactures to cover the year 1953 and every fifth year thereafter.

"The 1947 Census of Manufactures covered all establishments in the United States engaged primarily in manufacturing,

5483 as defined in the 1945 revision of the Standard Industrial Classification sponsored by the Bureau of the Budget. This system of classification is now in general use not only among Government agencies but also outside the Government. In a few instances, however, the Standard Industrial Classification was not followed; such departures are noted in the census reports for the industries affected."

That seems to be enough, your Honor. I submit to you this is the result of a census taken by the Department of Commerce under the Census of Manufactures Pursuant to an Act of the Legislature of the United States.

Mr. GESELL. That doesn't make it relevant.

The COURT. Go to the next page. I want to see what is contained here.

Mr. GESELL. If he is going to read it all, I don't see what the discussion is. I want to talk about the relevance of the document.

The COURT. You may be more familiar with the document than I. I want to see what portion of the document he wants to use.

Mr. MINICUS. I am using the entire document, your Honor, as a basis of comparison for the cellophane industry.

5484 Mr. MINICUS. I am using the entire document, your Honor, as a basis of comparison for the cellophane industry. For example, in here I have shown

Mr. GESELL. He is offering the entire group of pages of these schedules.

The COURT. You mean you want to compare it with rubber footwear?

what rate of return this price will give you. If you got to worry whether it is going to be 6% or 7%, if you can set your price with a forecast to yield you 6%, we say that that is an anti-competitive price regardless of what the rate of return is.

More in the nature of what is an anti-competitive price was the one found in Mr. Gessell's final statement the other day. The session closed with this statement yesterday afternoon:

"If to compete we brought the price down and others found that they had to get it down there to sell the goods—they had to get it down."

If this price is set arbitrarily and others have to follow it, then the arbitrary price for duPont cellophane becomes the arbitrary price for all cellophane.

Now, with regard to this rate of return it is true that in the cellophane operations from the documents the Division was expected to return a certain percentage on investments. I think the documents make that very clear. Who expected them to show that rate of return? The documents are again explicit. The Executive Committee of E. I. duPont de Nemours expected the Cellophane Division to make a specific rate of return. Now, what was that rate of return? The documents indicate it
5457 is somewhere in the neighborhood of 20% after taxes. The thing for us to show at this time now is, Was it realized? I mean, if this was just a guess and nothing ever came of it, a lot of people talking that it would be nice if they had a 20% return, that would be one thing. Let us see if they got it.

The Court. I haven't gotten over a couple of hurdles back here. Did you say that in order to make a rate of return—that is, if a company, a business, or an individual wishes to make a ratio of return on his investment and he has to fix a price to do that, he violates the law?

Mr. Minicus. Not at all, your Honor.

The Court. I misunderstood you, then.

Mr. Minicus. I say if that is the only consideration that a person in business has to think of when he makes that price, then there is something very abnormal in the market place, because business men, to the best of my knowledge, do not set their prices entirely divorced from any other market consideration but the rate of return. It would seem to me that what their competitors, if there were any real competitors in the market, were charging for the article would very greatly influence their determination, and it would show up in the documents in which the price situation was being considered for one thing.

I say that is the paramount consideration—sometimes the
5458 only consideration. Then it seems to me that if that corporation does not have anything to worry about but how

much return it can realize on the thing; competition must be pretty quiescent in the industry. It has been my training, which might be kind of old fashioned today, that the thing that sets the price is ordinarily certain factors dependent upon supply and demand, not the predetermination of a rate of return.

Now, your Honor, I am about to commence the consideration of——

Mr. Gesell. I want to reply to this before he gets into some other subject, your Honor.

The Court. I will limit you to five minutes.

Mr. Gesell. Very well. I doubt if it will take that long.

"Was this a stable price? Answer: No. From January 1, 1935, in 12 years we made five reductions and did not increase the price although the wholesale price index was constantly going up, thereby effecting an additional reduction without a change."

No. 2: Any thought of competition? The documents are full of discussion of competition; price competition from Sylvania, consciousness of competition by other flexible wrapping materials. We have had that before the Court a great deal.

5459 Unjustifiable price spreads? Why can't we charge more for moistureproof than plain? What law says we can't? Particularly if it has added value in the trade and is a patented product?

To say we set with no consideration except for the rate of return, well, I should gather from what he said it is all right to think about the rate of return a little, and I can assure your Honor that if you worked with the duPont Company and you are reporting to the Executive Committee these standards on which it will commit the capital of the stockholders to new investment, you have to show that return, whether it be cellophane or anything else, or you can't make the new investment; and that is what these reports are, reports to the Committee that supervises the investment of the company's funds. It is a paramount consideration in the company that only money be invested where an adequate return will be obtained. This is not a question of the Executive Committee saying it would be nice if you made some return. It is a question of the Executive Committee saying to all the people throughout the company, "If you don't make this return you improve your inefficiency by research or you get out of this business. We are not going to conduct a business where you can't make money for our shareholders."

Of course we thought about the rate of return.

The Court. Do you want to start that new section now Mr. Minnich?

5460 Mr. Minnich. Yes, your Honor.

I am about to consider a series of reports, your Honor.

The defendant has these. They are very easy to find in the books, but there are two books involved, and since some of the material will be statistical you may care to follow me. The reports have just been set out there in order rather than have the Court go to the books.

These exhibits have all been admitted into evidence, so I will simply mention them by exhibit number and page.

The first is Government's Exhibit 376, beginning at page 947.

The COURT. Is this under the Section, Power to Exclude?

Mr. MINICUS. Yes, sir.

The COURT. And the sub-heading under that, Financial Statistics?

Mr. MINICUS. Yes, sir.

The COURT. When you finish with your financial statistics, do you give me information that you are then going to consider that portion of this phase of the case where you are going to Size, Concentration and Entrenched Business Position?

Mr. MINICUS. Yes, sir.

If your Honor will observe page 951 of Exhibit 376, you
5461 will find set forth there two tables. The top half of the page, which will be the case in all of the reports, is concerned only with the month of December, but the second table on the page is a table up to date December and covers all of the appropriate year. In this case the report is for December, 1946, and the statistics in the second table on the lower part of the page are for the year 1946.

Now, we see set forth there—before I embark upon the consideration of these figures, your Honor, I would like to point out one fact that is very important. The Government is not here attempting to prove duPont's earnings down to the final definitive decimal point. What we are attempting to show in this case at this time is that in each year duPont's earnings were in excess of a stated amount.

Mr. GESELL. What is the amount? So we know what you are talking about.

The COURT. I was just about to ask that question.

Mr. MINICUS. I will indicate that. A stated amount for each year, as the reports will show, that the earnings exceeded the amount that we will come to in these reports or the rate of return.

Your Honor will observe in the second table "Outside Sales Cellophane Division," there are listed five products. The first two are cellophane and Cel-O-Seal caps and bands. You will note that the sale for cellophane for this year were $42,-
5462 114,000 odd, and that for caps and bands they were $4,110,-
000 odd, a total of approximately $46,200,000. You will

note that the total sales for the Division were $18,511,000. In other words, the vast bulk of this business was in cellophane and caps and bands.

5463 Moving over two columns to the right under the heading "Operative Earnings," we find that duPont's stated operative earnings from cellophane sales was $12,089,440, and for caps and bands, $1,826,223. Those sales together represent $13,915,663. The total earnings for the Division as noted at the bottom of the column were $14,344,700.

Taking as a base these earnings of $13,900,000 odd.

Mr. Gesell. He is now dropping the word "operative". They are not earnings. We are right back to the subject the witness was on. He is now attempting to do what his witness was incompetent to do.

Mr. Minicus. There is a slight difference; these are duPont's own statements and documents—

Mr. Gesell. These are the very figures, your Honor, that were presented in the table which was knocked out after cross-examination on the voir dire for lack of competency.

Mr. Minicus. I disagree, your Honor. These are not the same figures. These are figures to the Executive Committee, and if duPont has any reliable figures, I guess their figures to the Executive Committee are reliable.

Mr. Gesell. I am talking about the representation made on them, not the figures.

Mr. Minicus. If I said "earnings," your Honor, I am very sorry I dropped a word; it is "operative earnings." I will attempt to be very careful in my phraseology here.

5464 Your Honor will notice on the preceding page, page 950, the last item on that page is "Average Total Investment" for the year. Now admittedly that average total investment is for the entire assets of the Cellophane Division. In other words, there are undoubtedly assets in there that are devoted to the business of cellulose sponges, CA film and PV film, but there are three things I would like to point out in regard to that.

We have been through a great many duPont reports and documents. We have never seen any investment figure broken down otherwise than this.

The second thing is that it is a fairly reasonable assumption that if sponges, CA film and PV film represent only 5 per cent of the business, the assets accorded to those film are probably not great in comparison to this figure of $14,941,000.

Finally, even if that were the case, by taking this broadened investment base, in other words, a base containing assets producing other things than cellophane and caps and bands, and relating

the operative earnings on cellophane and caps and bands to that broadened investment base, we will get a lower rate of return than we would have if we had the actual dollar value investment in caps and bands and cellophane assets. In other words, we are showing the lowest possible return figure that we can show through the employment of this broadened base. Conse-
5465 quently, any figure that we derive by relating these operative earnings to this broadened base will be a very moderate figure in relation to the actual operative return on investment.

Now, taking the figure of $13,915,663 as the operative earnings for cellophane and caps and bands, and relating that to this average total investment of $44,941,371, we have an operative return of 30.9 per cent.

You will note, your Honor, that just above there is the statement of a per cent operative return on a yearly basis of 32.3 per cent. That is the operative return on all of the activities of the Cellophane Division, and as I forecast, this operative return on the caps and bands and cellophane business on this broadened base is less than that 32.3. However, the 30.9 per cent operative return is the figure that the Government is offering as the minimum figure of an operative return figure.

You will also note below that, your Honor, that there is a per cent return on a yearly basis. That is quite a different figure from the 32.3 that is shown. The 32.3 is a per cent operative return on a yearly basis; the 18.1 is a per cent net return on a yearly basis. The net return on a yearly basis designates what is left from that operative return after taxes and certain over-all expenses of the duPont Company. We will demonstrate in a few moments that taxes really represent the lion's share of the difference between 32.3 and 18.1 per cent.

We further submit that for the purposes of economic analysis that there is nothing unusual about using the operative
5466 return on a yearly basis rather than the net return on a yearly basis after taxes. We say that because taxes are very often a variable item and do not reflect the company's policies or operations.

We are not going to take such an untenable position as to say that taxes are not an expense of doing business. That is not what we mean. We mean here that we are attempting to gain some sort of a standard to see just what these duPont profits really mean year after year. And we submit that for purposes of a standard, the operative rate of return on investment will present us with a truer figure than the net return after taxes.

I say that for two reasons. One I said taxes were a variable. The second reason is that in this case the figure that is shown for net return on a yearly basis, for certain years in these reports, at least from 1940 through 1945, is not a determinable figure, that that figure for the years that I have mentioned is not the figure at all for the simple reason that a good part of that—and it will become quite apparent in the comparison of the statistics—represents excess profits taxes. And the duPont Company at the present time has a claim against the Government for an enormous amount of money under Section 722 of the Internal Revenue Act for a return of those taxes as over-payment. A large sum of that enormous amount is attributable to cellophane. If the duPont Company is successful in that claim with the Internal 5467 Revenue Bureau, then this second figure for those years, that is, the net return on a yearly basis, will have to be expanded upward. That is not true of the first figure, the operative return on a yearly basis, and for that reason I submit it is a more accurate statistic for our consideration at this time. However, in this year the operative return on a yearly basis for duPont's operations in cellophane and caps and bands was 30.9 per cent before taxes.

Mr. GESELL. And other expenses.

Mr. MINICUS. And certain other expenses that are expenses of the over-all duPont Company.

Now, following the same method of economic analysis, at page 945 of Government Exhibit 375, we find that the operative earnings for cellophane and caps and bands for the year 1945 were $15,339,821. Cellophane was $13,793,000 odd, and caps and bands was $1,545,000 odd. That is a total of $15,339,821.

Our average total investment for that year, as will be noted on the preceding page, 944, was $43,897,576. Relating that the operative earning figure of $15,339,821, we have a per cent operative return on a yearly basis of 35.1 per cent.

The COURT. 36, isn't it?

Mr. MINICUS. The 36.1, your Honor——

Mr. GESELL. This is the Minicus adjustment of our figures.

The COURT. I see.

5468 Mr. MINICUS. The 36.1 would be relating the earnings of all of their products to this average investment. The earnings of all of their products is $15,767,036. But on cellophane and caps and bands their operative earnings amount to somewhat less than that, $15,339,821. I am just relating those earnings alone, the products in this case, to that investment we have 35.1 per cent. On the entire company the operative earnings, as your Honor has pointed out, is 36.1. Here we see the spread between net return on a yearly basis and per cent operative return on a yearly basis expanded quite considerably. We now find that the operative return is 36.1 and the net return on a yearly basis is down to 14.6, or a spread of 22 points. In that regard I call your Honor's attention to the fact that this report covers the year 1945, which was the last year of the excess profits tax.

Now, if your Honor will please observe page 940 of Government Exhibit 374, you will see that for that year the combined operative earnings for cellophane and caps and bands amounted to $15,243,901. That is pretty close to the earnings for the entire Division for all of their products, which was $15,630,770. Relating that back to the average total investment shown on page 939, the preceding page, the average total investment there is indicated to be $44,964,190.

In obtaining our operative return on a yearly basis through the relation back of the earnings on cellophane and caps and bands, we have a per cent operative return on a
5469 yearly basis of 33.9 per cent. This again is slightly under the stated per cent operative return for all of their products, which is 35 per cent. Here you will note the net return after taxes is away down to 10 per cent, and the excess profits tax is in full swing during the year 1934. The figure that the Government is offering at this time is the figure of 33.9 per cent before taxes and certain other undistributed expense of the over-all company.

If your Honor will kindly observe page 934 of Government Exhibit 373, again we find the operative earnings for cellophane and caps and bands set forth at $15,417,798. Now, in this case the preceding page of this report, and several more to come, do not give as the others have the total operative investment. However, the amount of the total operative investment is quite apparent from the last figure on that page, per cent turnover on yearly basis. In other words, their sales for that year, as shown above, sales and transfers, are $44,049,232, and that was 94.6 per cent of the total investment. Well, that gives a figure of total investment of $46,563,670, and relating the earnings to that, we get an operative return on investment for cellophane and caps and bands of 33.1 per cent, and again we find ourselves just a little bit below the per cent operative return on a yearly basis given in the official figures for all the products within the Division. Now we note that there is even a greater decline in the per cent net return on a yearly basis which is now down to 9.3, and the year is 1943.

5470 Government Exhibit 372, at page 929, again sets forth the operative earnings for cellophane and caps and bands, and there they are $12,482,112. The average total investment of the Cellophane Division derived from the same period as in the previous exhibit is $46,564,700. The relation of these two figures gives us now an operative return on a yearly basis of 26.7 per cent. We will note now that the official operative return for all the products is 27.8 per cent, and now in the year 1942 the net operative return after taxes is down to 8.4 per cent.

Government Exhibit 507 at page 6962 lists for the first time plain cellophane, moistureproof cellophane and caps and bands as separate items underneath receipts. So we have $3,407,000 odd net receipts for plain cellophane, $12,523,000 odd for moistureproof, and $971,000 odd for caps and bands. This gives us a total net receipt figure of $16,902,036. Here again, on the preceding page, 6961, we find something more in the nature of a profit and loss statement than we had had before. There is a little more detail on costs in here, but we find the same familiar figures. We find again our turnover on a yearly basis, and from that it is apparent that the investment for that year is somewhat below the sales or $42,963,732. And the net receipts from the preceding page related to that total investment figure gives us a net receipts figure before undistributed expense, a rate figure of 39.3 per cent.

5471 Now, the official figure again for all operations of the Division is just a little higher, to wit, 40.51%, and we now find in the year 1942 that the net return after undistributed expense goes up a little bit, too. That is now at 14.97%.

Mr. Gesell. You don't mean going up, because you are going backwards.

Mr. Minicus. Going up and going backwards.

The Court. How can you do that? That is talking on both sides of your mouth.

Mr. Minicus. I am sorry, sir, but I was referring to the analysis that we are making rather than the actual point of time.

The Court. What you mean is chronologically you are going back in time?

Mr. Minicus. Yes, sir.

The Court. And as we do that we find this—

Mr. Minicus. This figure will rise again.

The Court. Is there any particular purpose in taking that approach?

Mr. Minicus. The chronological—

The Court. Why did we start with 376, which was for the year 1946?

Mr. Minicus. Yes, sir.

The Court. We have gotten back to 1942 now. Why
5472 didn't we start with 1942 and work up? Not that I am criticizing you, but I just want to know your purpose.

Mr. Minicus. The reason was a very practical one. It was in these later years that we had the investment figures to start with. We don't have them in the earlier years.

The Court: I see.

Mr. Gesell. Your Honor, I don't want to protest, but there must be a simpler way to get these figures before the Court.

Mr. Minicus. We tried that last Monday or Tuesday, your Honor, and there was objection to it.

Mr. Gesell. You didn't present any of these figures and you misrepresented by not putting in all the costs.

If he is going to have this formula, why doesn't he hand you a piece of paper with it on, instead of taking all this transcript time and everything else? We see his method now. We can comment on the validity of it at the appropriate time. There must be a simpler way. Maybe he should just read in his ultimate figure. None of this is evidence.

Mr. Minicus. If Mr. Gesell will consent to that, I will read in the ultimate figure.

Mr. Gesell. None of this is evidence anyhow. It is comment.

5473 The Court. At least you have established your formula now, and it seems to me you can read your figures in for any period you have in mind.

Mr. Minicus. Thank you.

Then for the year 1940 the Government presents its minimum net receipts figure before undistributed expense of 35.1%.

Now, I would like to point out in addition to that that if the Court will look at the official figure for ~~percent~~ return on a yearly basis after undistributed expense, we will find there that we have a figure of 26.65%. In other words, the figure now is up to within almost ten points before the undistributed expense figure.

For the year 1939 the Government's minimum figure on net receipts before undistributed expense is 36%. The official figure for all the operations of the Division is now up to 28.16%.

Mr. Gesell. The net figure.

Mr. Minicus. That is the net figure after undistributed expense.

The Government's minimum figure for the year 1938 percent return on a yearly basis before undistributed expense is 27.27%. The official figures of the company after undistributed expense are now 22.26%, after undistributed expense.

5474 The year 1937, the Government's minimum figure of per cent return on a yearly basis before undistributed expense is 24.43%, and the official figure of the company on all operations after undistributed expense is 19.96%.

For the year 1936 the Government's figure, minimum net per cent return on a yearly basis, is 29.48%.

I have finished with that section, your Honor.

Mr. Gesell. Well, your Honor, I don't see anything to comment to. We have never said that this business was not a business that made some money.

The Court. Very well.

Mr. Gesell. He does not present this in comparison to anything, your Honor.

The Court. I have no comment.

Mr. Gesell. Maybe I ought to precipitate this by moving to strike on the ground that the showing as to what our profits are, uncompared to anything else, is not probative of anything.

The Court. That comes back to my inquiry yesterday: How do you peg your price or how do you peg a percentage return as being violative of the Sherman Act?

Mr. Gesell. I am subject to the same disability, your Honor. I don't know how to comment, because I don't know what the significance of it is. It does show we did not sell below
5475 cost, which I suppose indicates we were not monopolistic in that regard.

The Court. My suggested procedure is that we simply go forward with our case, and at the time this particular material is utilized by the Government, its purpose will be disclosed to you and you will then be able to cross swords with Mr. Minicus and meet the issue. Now that we have heard it, certainly I am not going to strike it out.

Mr. Minicus. It is the Government's position that among the deterrents to the entry of new competition into this industry is one that also is of importance, and that is the size and the entrenched business position not only in cellophane itself, but of the duPont Company in the chemical industry.

Mr. Gesell. I thought he said we were not going to have an attack on size, your Honor.

Mr. Minicus. I said that that is one of the considerations in the case. It is not an attack on size. I don't think in any monopoly case can we disregard entirely the subject matter of entrenched business position in any industry. I believe entrenched business position to be one of the strongest earmarks of any monopoly.

We don't consider that this is crucial, and of course it will not be covered in its entirety under this heading at this time, but I think entrenched business position is not something you can
5476 present statistically; it has got to be gathered from all the evidence of the entire case, the people with whom duPont dealt, who they made licenses with, whom they contracted with, from whom they bought goods, their relationship with people in other lines of business are all part of the fabric in this thing. At this time it is only my desire to offer one document bearing upon

certain aspects of the financial history of the duPont Company, and I don't see how there can be any objection to it. It is a 23-year financial operating record of E. I. duPont and its wholly owned subsidiaries, and it is in fact an excerpt from the annual report for the year 1949 to the stockholders of E. I. duPont de Nemours & Company at page 38.

Mr. Gesell. Your Honor, I object to it on two grounds: 1. I can't see the relevance of the company's operations as a whole: and, second, if your Honor will look at this proposed exhibit—

Mr. Minicus. I haven't offered it yet. I was just about to offer it.

Mr. Gesell. You offered it then.

Mr. Minicus. Oh, all right: I offer it.

The Court. Go on, Mr. Gesell. Finish your comments. He is going to offer it.

Mr. Gesell. I thought he had offered it.

He has figures here showing operating investment and percent returns of the company as a whole, and I assume that
5477 what we are going to end up with is a comparison between those figures and these divisional operating reports, and there is no— —

The Court. Are we?

Mr. Minicus. It is a very nice thought, your Honor. I would like to do it.

Mr. Gesell. Of course, he would, and there is no indication that they were prepared on a comparable basis at all, and I can't agree to this schedule on the grounds of relevance or materiality or comparability to the other figures. This is a cellophane case, I thought, and here he is bringing in the operations of the entire company.

Mr. Minicus. Mr. Gesell asked us to compare the returns of some other company or something else, to compare these figures with something else. What better standard of comparison could we have than the company itself in the chemical industry?

The Court. Would you say it would be a fair comparison to relate cellophane to a lacquer paint?

Mr. Minicus. In a recent case, your Honor, the United States against General Electric, Judge Forman had the Government admit evidence of a comparison between the earnings in the lamp industry and the general level of earnings for all corporations in the United States.

Mr. Gesell. I guess the duPont Company makes about
5478 4,600 products, your Honor, that are embraced in these figures.

Mr. Minicus. We have heard a great deal how the basis of the company, though, is largely cellulose.

The Court. Here we are involved with an article which is involved in the main in the packaging industry.

Mr. Gesell. Yes.

The Court. Does the Government propose to come forward not on the ground of any substituted material as suggested in one of my former memorandums, but do you propose to come forward with some article of commerce used in the packaging industry and see what the rate of return was with respect to that?

Mr. Gesell. That would be a little closer, it seems to me.

Mr. Minicus. We had that in mind, your Honor.

The Court. But to take the innumerable products of the defendant and put one or a series or a number or a collection in juxtaposition to another in order to draw some sort of percentage comparison between the two on rates of return, frankly, it does not appeal to me. I don't see where that would prove anything to me as to the dominance of this defendant, because eventually that is what you are going to come to. Whether you admit it or not, that is what you are after, the dominance of this company in the field of cellophane. Since January we have been
5479 hearing that this is a suit about cellophane, an illegal monopoly with reference to the manufacture and sale of cellophane. I may have observed in passing that we have enough documents now with respect to that issue without going into a comparison of how many years—nearly a quarter of a century of the earnings of duPont Company and all its products.

Mr. Gesell. The witness the other day told us, your Honor, he knew what Sylvania's costs were. There might be something there we could take a look at.

Mr. Minicus. I don't think if the industry is monopolized, Sylvania's costs would be very helpful.

Under the heading "Concentration of Economic Power," I have a report by the Department of Commerce to the House Sub-Committee on a study of monopoly power which sets forth certain information. I want it clear that this information was compiled and is the official records of the Census Bureau, and it is the Census of Manufacturing Statistics for the year 1947.

The purpose of this data I am about to present is to offer a frame against which the concentration of economic power existing in the cellophane industry can be measured.

The Government offers in evidence Government Exhibit 457 at page 5893.

Mr. Gesell. Now, if your Honor please, here is a report to Congressman Cellers' committee by the Commerce
5480 Department. It does not relate to duPont; it does not relate to cellophane. It shows the concentration in cured

Mr. GESELL. And morticians' goods and all the other things in there.

Mr. MINICUS. I want to compare it with all industry in the United States, your Honor, as measured by these statistics, and I could show that by this document the Bureau of Census has not disclosed a single case of concentration of economic power comparable to the facts of this case. This is a degree of concentration of economic power which is unique; that there is not another illustration among these 400 odd industries laid out in this other——

The COURT. Where is the cellophane industry noted here?

Mr. MINICUS. It is not noted in this case.

Mr. GESELL. Neither is the chemical industry. You see, this is done on a company basis because the census is on a company basis, and therefore when he compares it with a product of a company it is another complete distortion.

5485 Mr. MINICUS. That is not true. If we take a look at aluminum there——

The COURT. Turn to page 5898. We will take item 3942, dolls. Show me how this data with reference to dolls is going to help me in the ultimate decision in this case.

Mr. MINICUS. Your Honor, I had not intended to present it in that form. The important data we have in this matter appears on page 5895. You have got to understand the entire composition of the thing, and that is the only reason I have offered all of it, but you will note on page 5895 that we have concentration of output in largest manufacturing companies; industries arrayed in order of concentration ratio, and we have there the industries wherein the top four companies possess from 75 to 100 per cent—46 industries in which the top four companies represent 75 to 100 per cent of the value of sales in the year 1947, the year of the filing of this complaint.

Mr. GESELL. You will find neither cellophane nor chemical products in that list.

Mr. MINICUS. You will find 46 other industries, though, your Honor. You will find aluminum, you will find small arms, telephone and telegraph equipment, botanical products, electric lamps, files, locomotives and parts, cigarettes, black glass—undoubtedly they didn't get every industry; I don't know how they missed cellophane; probably they couldn't get away down there to the bottom of the duPont Company to get those statistics——

5486 Mr. GESELL. If he turns to the first page he will see why they didn't. This report is concerned with a company report and not with a product by product report in the Census of Manufactures.

Mr. Minicus. I presume the duPont Company is a company and they made reports to the Census of Manufactures.

Mr. Gesell. In other words, what they have listed here are cases where the companies' primary activities are in these lines.

The Court. I am going to admit the document in evidence and you can make use of it as you see fit.

Mr. Gesell. May I argue the case, your Honor, which I mentioned?

The Court. Well, at a proper time. Do you want to do it now?

Mr. Gesell. Yes. It will take me just a couple of minutes to tell you.

In the International Harvester case before the Supreme Court, an anti-trust case, the Government offered a report which the Federal Trade Commission had made to the Congress pursuant to a joint resolution of the Congress for the purpose of showing just as this report is offered here the economic conditions in that industry, and the Supreme Court said it was error of the lower Court to admit that report, because it deprived the defendant of his right of cross-examination.

5487 The Court. Well, was the report relied on by the Court below?

Mr. Gesell. Yes, it was.

The Court. It must have been or else they would not have claimed it was error.

Mr. Gesell. Yes, it was, and I must so assume that when we admit something here——

The Court. That does not mean I am going to rely on it.

Mr. Minicus. I would like to raise one other point in regard to this report, your Honor. We have a pre-trial order in this case that requires objections—that requires the parties to be notified of objections to the documents at certain dates. This was one of the documents that was served upon the defendants in December, and the pre-trial order required that there be a written list of objections given to the Government by——

Mr. Gesell. Read the objections we took to it, Mr. Minicus.

The Court. You have objected to this?

Mr. Gesell. Yes.

The Court. And you have not had an opportunity to be heard?

Mr. Gesell. I have now that your Honor has heard me on this case, on this argument. But I had noted my objection, and our rule is that we can argue it later on. I say that under

5488 the specific ruling of that case this should——

The Court. Can you get one of your associates to read the citation in the record so I can read the case?

Mr. Gesell. It is the International Harvester case, your Honor, in 47 Supreme Court Reporter at page 752. I have it here and I would like to hand it up.

The Court. Let me have that.

Mr. Gesell. It is the part marked in red, your Honor, which is pertinent.

I am told I was in error in stating the case to your Honor. They held it was not error to exclude the report, not that it was error to admit it.

The Court. Did you have something more?

Mr. Gesell. No, your Honor, I have finished.

The Court. I am going to stand by the ruling I have made this afternoon. I am going to allow the document to be admitted because I cannot clearly visualize the purpose for which it is to be utilized. When that purpose is made apparent to me in the form of a definitive argument on the part of the Government, I then will reconsider my ruling of the admission of this writing into evidence and will consider that you at that time will have made a motion to strike it.

Mr. Gesell. Thank you, your Honor.

The Court. In other words, make a note in your agenda at the time we have our full argument on this case that
5489 that should be brought to my attention.

Mr. Gesell. Thank you, your Honor.

(The study of monopoly power received in evidence and marked "Government's Exhibit No. 457.")

Mr. Minicus. I desire to point out to the Court at this time that each of the 452 industries that are the subject of this report is arrayed in the report in four categories. In the first grouping the four largest producers in 46 industries selling more than 75 percent of the domestic output——

The Court. Frankly, Mr. Minicus, why are you urging this report on me when the record is replete as to what the status of the defendant is in the cellophane industry?

Mr. Minicus. That is quite true. The purpose of the whole thing is to show that no other industry of these 452 comes anywhere near the degree of concentration that we find in the cellophane industry.

Mr. Gesell. But this is not a listing of all industries, your Honor. That is just the basis of my protest against this kind of comparison.

Mr. Minicus. It is stated here by the Secretary of Commerce that this is part of a broad study of the problems of competition and monopoly that "I have recently initiated at the Department of Commerce." I mean, the purpose of drawing of all of these industries together and all of these products together was to show the degree of concentration.—

5490 The COURT. Well, if that looks toward legistlation, it is Congress' job to take care of that proposition, not mine. If that is the simple basis of the study, if there is to be a break-up of the economic power and the appropriate Judiciary Committee of the House of Representatives have seen fit to make an examination of that question, it would seem to me to lie within their expert competence to examine such questions. Frankly, I don't see how it is much help to me in this vase, but if you want to pursue it, go ahead. Or you can pursue it Tuesday morning at ten-thirty.

(At this point the trial was adjourned to Tuesday, April 24, 1951, at 10:30 o'clock a. m.)

* * * * *

5494 TUESDAY, APRIL 24, 1951, 10:30 O'CLOCK A. M.

Present: As before noted.

The COURT. Proceed, Mr. Minicus.

Mr. MINICUS. If your Honor please, the government has added a new attorney to its staff, Mr. Joseph M. Fitzpatrick, who is a duly admitted member of the Bar of the Commonwealth of Virginia, and, if it please the Court, I move Mr. Fitzpatrick's admission pro hac vice.

The COURT. You are a member of the Bar of the District of Columbia?

Mr. FITZPATRICK. No, your Honor, I am not.

Mr. MINICUS. The Commonwealth of Virginia, sir.

The COURT. You are admitted, Mr. Fitzpatrick.

Mr. GESELL. While we are on preliminary matters, your Honor, we have prepared this reconciliation of the answer to the interrogatory with the amended answer which we mentioned on Thursday. We have given copies to the government who have checked the accuracy of our reconciliation, and I now would like to hand your Honor a set which puts the interrogatories in their existing form.

The COURT. Thank you.

Mr. GESELL. Are you going to deal with this Celler committee matter or are you going to another subject?

5495 Mr. MINICUS. I hadn't intended to. It is in evidence and I have said all I need to say.

Mr. GESELL. I would like to have one further comment on the Celler matter, your Honor, which was left up in the air the last day.

The COURT. Yes, sir.

Mr. GESELL. Over the week-end I had made some investigation which disclosed that both representations which Mr. Minicus made concerning the document and I made were inaccurate, and I think we should correct the record with respect to that matter.

The Court. My comments must fall in the same category.

Mr. Gesell. The point to which I refer is that both of us stated to the Court that cellophane was not covered by this schedule and caps and bands were not covered. I have looked into the background of this report and I find they both are covered by this document; and I feel that that fact should be called to the Court's attention, because it throws light on the nature of these statistics, and I think also demonstrates their complete unsuitability for this case.

This Exhibit 457 classifies manufactures, not manufacturers, but manufactures in accordance with the standard industrial classification sponsored by the budget which was a document approved by all the different agencies of the government promulgated in 1945 by the President. Now, under that classification, which is not presented with this document, but on which, as is
indicated at page 5894, the entire compilation is prepared,
5496 we find that cellophane is included in the schedule and
appears on page 5898, Item No. 2823, where the classification is carried of plastic materials, and under that heading comes the entire cellophane industry along with other industries. That classification, of course, shows a very low concentration, and it appears that if the government is offering that as the classification of the market or the field, that the cellophane industry in its totality, both duPont manufacture and Sylvania manufacture,
comprehends but 15% of the items in that classification.

5497 Similarly if we take up caps and bands which are involved in this case, they will be found at page 5895, under item 2825, synthetic fibers, and cellulose caps and bands are there classified, and on the basis of that kind of a presentation the caps and bands represent but three-quarters of one per cent of the industrial sales of that particular classification.

I should also point out, your Honor, that cellophane bags, that is, the converted item, appear under the standard accounts at 2661 on page 5897 under the classification "Paper Bags."

So that what we have here is a presentation by manufacturers of the various products involved in this case, and if this analysis of the concentration of industry is to be taken as the guide, it demonstrates that as to cellophane and the companion products which according to the classification are made to conform to the existing structure of American industry—that is the language of the promulgating order—then we have a complete lack of any concentration. And Mr. Minicus' suggestion to you that he could not understand why cellophane was not in here and his indication that there was no concentration as great as cellophane simply does not work out at all when the underlying basis of the accounting is analyzed.

I think on that ground we ought to throw the document out as being doubly worthless.

5498 Mr. Minicus. I think there is a great deal of merit in what Mr. Gesell has said. Over the weekend we, too, have checked these categories, and whereas we have found that certain of them are very specific, others are quite generic, such as listing cellophane under the general field of plastics, which is rather an unusual procedure, particularly in the industry.

The Court. Well, I have admitted the document or the writing. Do I have anything before me at the moment?

Mr. Gesell. My motion to strike was made which your Honor asked me to defer to the end of the case, but in view of this I would like to renew it now.

The Court. Do you take a position on that, Mr. Minicus? Do you resist the motion?

Mr. Minicus. We do not resist the motion.

The Court. Well, let the document be stricken.

(Government's Exhibit No. 457 withdrawn.)

Mr. Minicus. We open a subject this morning, your Honor, which is introduced at Section V of the Government's trial brief, to wit, the Abuses of the Rights Under United States Letters Patent, to which we claim the defendant company has subjected its patent rights.

In introducing this subject I would like to tie it up for a moment in terms——

The Court. Excuse me, Mr. Minicus. You say V. My 5499 V reads, Defendant's Activities Relative to the Distribution and Sale of Cellophane and Caps and Bands.

Mr. Minicus. I think you are looking at the index, your Honor. I was speaking of the trial brief. In the index it is III and in the trial brief the Government's contentions are made originally at V on page 12.

In introducing this subject I would like——

The Court. Just a moment. Would you refer me to the index of the exhibits?

Mr. Minicus. Yes, sir. On the third page of that index, midway down the page, your Honor, will see III. Defendant's Patent Practices and Policies. That is the general subject that we are about to open. Since the index was made, there has been a revision of our patent section, and when we get to it, the first subject to be covered will be found on the next page under 5, Cross Licensing of the Moistureproof Cellophane Patents.

The COURT. Thank you very much.

5500 Now, looking for a moment in transition at the relationship between this section concerning which evidence is about to be introduced to a previous section of the defendant's power to control the technology pertinent to the industry:

In the previous section proof was adduced regarding the number, nature, and use of rights possessed by the defendant under United States Letters Patent. It was there stated that the entire scope of the defendant's control of technology pertinent to this industry would not be covered within the scope of the evidence there adduced. Proof of the existence of a power often entails exposition of the use of that power. A delineation of the abuses to which duPont subjected its rights under patents will render obvious the degree of patent control inherent in the defendant company, as well as the accretion to its power. The evidence immediately to follow is intended to establish that the defendant employed its own patents to control operations by Sylvania and Celon and brought within its sphere of influence the important patents of the other two manufacturers. The government maintains that this was accomplished in largest degree by means of unlawful pooling of patent rights. Whereas patent pooling has been the principal modus operandi in accomplishment and exercise of duPon'ts patent control, evidence will also be introduced probative of other patent practices by which duPont suppressed other manufacturers and regulated the industry as a whole.

5501 In opening this section addressed to the abuse of patent rights, the government will offer evidence relating to the utilization made by duPont of its moistureproof patents, and at this point, your Honor, we move to the allegations contained in the trial brief 98 through 121, and in the index Roman III, Arabic 5.

The relationships engendered by the licensing of these patents, that is, the moistureproof patents, has been selected by the government to introduce the patent section, because they illustrate the foundation of duPont's patent policies, and they reflect a summary of all the abuses to which duPont has had recourse under its patent rights.

Now, court decisions have found that patent pooling comprises all modes and forms of cooperation between patents held by different interests. Strictly speaking, a pool exists when title to the patents is transferred; but the considerations present in cross-licensing agreements are virtually identical, so that the two modes of patent cooperation are often treated as synonymous. This does not necessarily mean that all patent pooling arrangements are illegal. The T. N. E. C. hearings and reports

held out the type of patent pooling existing in the automobile industry and in the aircraft parts industry as beneficial to the industry and to the public. The recorded history of that pool contains not a single instance of exclusion, rejection, or expulsion of anyone desirous of entering it. The patents subject to that
pool were found to be available to all who might desire to
5502 use them, and there has never been any record of an intent
to retain control of them within a small, exclusive group. On the other hand, patent pools have been found to be particularly offensive under the anti-trust laws when comprised of a small, dominant group within an industry possessing the intent of restricting membership to those already within the group.

Now the government contends that the means by which duPont transferred and acquired rights relating to patent reading on moistureproof cellophane constituted an unlawful patent pool. Broadly speaking, this subject will be presented under two main headings; namely, suppression of the other existing manufacturer, and, two, exclusion of all others.

The first evidence we are about to introduce under this subject, your Honor, is addressed to certain background material under the heading of "The First Merchandising of Moistureproof Cellophane and the Early Patent Development."

* * * * *

5534 Now we come to another one of these good normal customary business practices. There was also another patent that had been issued by the Patent Office at this time. This was the Groves patent owned by Titanine, Inc. This patent covered a composition which contained a wax and a dope and was primarily for the use of coating airplane wings.

The Government offers in evidence Government Exhibit 2836 at page 6107.

5535 (Letter from Mr. Pralatowski to Mr. Farmer dated October 10, 1929, was received in evidence and marked "Government's Exhibit No. 2836.")

Mr. Minicus. The Government offers in evidence Government Exhibit 2837 at page 6108.

(Copy of Agreement between Titanine, Inc. and Du Pont Rayon Company dated March 21, 1930, was received in evidence and marked "Government's Exhibit No. 2837.")

Mr. Minicus. I had better read the second paragraph of Government Exhibit 2836. This is a letter from Mr. Pralatowski to Mr. Farmer dated October 10, 1929:

"As I said to you in New York, we will not infringe this patent by using our moistureproof Cellophane process, but since our applications will likely not cover more than one wax in the moistureproofing composition, and since this patent covers that subject, we think it is worth while for us to get the patent instead of having it owned by others and so possibly falling into the hands of competitors."

The next paragraph reads:

"I think you should confer with Mr. Pritchard and make sure as to the present status of the negotiations as well as to discuss with him the patent itself. It is true, of course, that we have no inclination to use this aeroplane dope which was the specific subject of the patent, and I think that every purpose will be served 5536 if we can secure a license to cover a film; that is to say, such films as are used as a license at a much more reasonable figure than it would be possible to secure the patent itself. I am writing to Mr. Pritchard today, telling him that I have sent you a complete copy of the file and that I understand that you are to continue the negotiations."

Government Exhibit 2837 is a license, an exclusive license from Titanine to the Du Pont Company. Beginning at the last paragraph of the license agreement, page 6109 of the bound volumes:

"Now, therefore, in consideration of One Dollar and other valuable considerations in hand paid, receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, Titanine has sold, assigned and transferred and by these presents does sell, assign and transfer unto Du Pont the exclusive license to make, use and sell and license others to make, use and sell the invention described and claimed in said Letters Patent for coating, impregnating or otherwise treating artificial threads, filaments, textile fabrics, sheets, and/or films including those produced from cuprammonium cellulose and cellulose derivatives including viscose, cellulose nitrate, cellulose acetate and cellulose ethers, for the entire term or terms for which said Letters Patent have issued or may be reissued or extended, subject to the following conditions:"

There is an instance, your Honor, of a patent in this 5537 field of moistureproof cellophane where the Du Pont Company specifically stated its intention not to use this patent——

Mr. Gesell. They didn't say any such thing.

Mr. Minicus. I will read it again. The second sentence in the last paragraph, page 6107, reads: "It is true, of course, that we have no inclination to use this aeroplane dope which was the specific subject of the patent, and I think to cover a film; that is to say, such films as are used as a wrapping tissue."

Mr. Gesell. You skipped a line.

Mr. Minicus. "* * * and I think that every purpose will be served if we can secure a license to cover a film;" if that doesn't say they don't intend to use it, I don't know what it does say. And I again call your Honor's attention to the primary purpose in the acquisition of this patent which was issued to another party for use in something not related to cellophane, which was to keep it so that nobody in the cellophane industry could get a hold of it.

Now, the documents the Government is about to introduce establish that early in 1931 Du Pont was considering an infringement action against Sylvania on the ground that the latter company was manufacturing and selling moistureproof cellophane. Under that heading the Government offers in evidence Government Exhibit
2482, begining at page 3204. This is a report from the
5538 Cellophane Company to the Executive Committee and is
dated February 18, 1931.

* * * * *

5544 (The excerpt from November 1931 report of Executive Committee, Du Pont Cellophane Company, Inc., was received in evidence and marked "Government Exhibit No. 2810.")

Mr. Minicus: The purpose of these exhibits is to explain certain situations arising in the course of duPont's preparation of its infringement action against Sylvania. Certain of the points that are brought out in the course of preparation of this suit by these documents are, one, the selection of counsel; two, the defendant's concern for the validity of the broad claims in its article of manufacture patent; three, certain testings that were made upon Sylvania's moistureproof product in preparation for the infringement action; four, speeding up the issuance of additional moistureproof patents that duPont then had pending as applications in the patent office in order to strengthen its suit; five, a decision made within the duPont Company that reliance in the prosecution of its suit would have to be placed upon the first six broad claims of its original product patent; and, six, formal notice to Sylvania of infringement.

The government offers in evidence Government Exhibit No. 2479 at page 3183. This, if the Court please, is a bill of complaint filed in this Court on January 28, 1932, and it sets forth the five patents upon which duPont bases its infringement suit against the Sylvania Corporation.

5545 (The bill of complaint in the suit of Du Pont Cellophane Company, Inc., versus Sylvania Industrial Corporation was received in evidence and marked Government Exhibit No. 2479.")

Mr. Minicus. The government offers in evidence Government Exhibit No. 2840 at page 3191.

Mr. Gesell. As to that, your Honor, we want some reservation before we proceed.

Mr. MINICUS. I was about to make the qualification, your Honor.

Mr. GESELL. That is the answer of Sylvania.

Mr. MINICUS. Of course the government does not present this exhibit saying that the various allegations appearing in here are presented for the truth of what they state. This was a matter in issue which might ultimately have been decided by this Court, and we are not taking the position that the allegations in issue were decided before the thing ever went to judgment. We simply say that this is Sylvania's statement of what they considered to be their defense in regard to this infringement suit that had been brought against them.

Mr. GESELL. I understand that to mean that the government does not assert that the facts stated in the answer are true.

The COURT. I so understand.

(The answer in the suit of Du Pont Cellophane Company, Inc. versus Sylvania Industrial Corporation was received in evidence and marked "Government Exhibit No. 2840.")

5546 Mr. MINICUS. It will be noted, just pointing out in passing, your Honor, that the main grounds of the Sylvania defense in this case were invalidity. This fact appears in Clause 7 on page 2 of the answer. Thereafter it lists its statement of what it considers to be the various bases for claiming the invalidity of the duPont patents. On page 2 we have the assertion of prior invention; on page 6 we have an assertion of non-invention, and also on page 6 another assertion of insufficient disclosure. On page 7 we have an assertion of excessive breadth of the claims of the patent, and on page 8 we have an allegation referring to the existing interference action which we have discussed earlier this morning.

Do you care to take over, Mr. Gesell, for some comments at this time?

Mr. GESELL. No.

Mr. MINICUS. Now, statements have been made at various times during the course of this trial by counsel for the defendant that because of the infringement suit pending against Sylvania that company originally came to duPont seeking a license under the moistureproof patent or patents. I think it was quite apparent that the point that was attempted to be made this morning in Mr. Gesell's interruption when I called your Honor's attention to a date late in 1931 when duPont thought that Dr. Wallach might be proposing, when he mentioned amicable settlement, his taking of a license. The documents about to be introduced com-

5547 pletely refute that position of the defendant, and in contradiction the government maintains that duPont solicited Sylvania's acquiescence in a license. We further contend that this entire infringement suit was nothing more than a harassing action designed to coerce Sylvania into entering a highly restrictive agreement.

The government draws attention to Government Exhibit 1410 at page 3200, previously admitted into evidence. This document is preceded by a covering letter from Mr. B. M. May to Mr. Carpenter, Pickard, and Blum dated November 19, 1929, and attached thereto is a memorandum by Mr. B. M. May dated November 14, 1929. At that time the Sylvania Company was just beginning to build their plant. They had not started manufacturing. Their first production came out late in 1930, so this is a year before the Sylvania Company produced its first pound of cellophane.

I shall commence reading from the top of page 2 of the attached report, or page 3302 of the bound volumes. The reading refers to a discussion of the morning of November 14, 1929, between Messrs. Pickard, Blum, Carpenter, Yerkes, and May, and subsequently between Messrs. Yerkes, Hatt, Phellis and May in reference to the position of the Du Pont Cellophane Company in relation to the Belgian Sidac's advances to Mr. Gillet and their influence on the Sylvania Industrial Corporation, their American subsidiary:

> "It was then suggested by Mr. Carpenter that we
> 5548 might gain our objectives through licenses under the patents under which the Belgian Sidac would acknowledge the validity of our patents and accept thereunder a license to operate under a specified quantity schedule by years. This consideration could be accompanied by delivery to us of 35% of the stock of the Sylvania Industrial Corp. or its equivalent. Stock so offered could be in reparation of damages done in the past. This stock we could, of course, dispose of. The limited licenses under the patents could be construed as limiting future damage. It has developed since the conference that the principal patents, purchased at the time we acquired the rights in America, have expired. It was also suggested that under the circumstances we might feel it desirable to give the Sylvania a limited license under our product patent for Moisture-proof Cellophane. This patent which we expect to get being a product patent, we would be in a position to specify the prices at which Moisture-proof Cellophane could be sold."

Now, whatever else that document indicates, it certainly indicates that a year before Sylvania was actually producing and selling cellophane the duPont Company was considering a restrictive license with regard to the Sylvania Corporation.

The government offers in evidence Government Exhibit 2478 appearing at page 3181. Here again we have a series of excerpts and reports from various Executive Committee meetings, Board meetings and conferences.

* * * * *

5595 The Court. Yes, we will take a ten-minute recess.

(At this point a brief recess was taken.)

Mr. Minicus: Your Honor will recall that the government has charged in its complaint and stated in its trial brief that Du Pont and Sylvania operated within the sphere of moistureproof regenerated cellulose pursuant to an understanding, an understanding that we contend was intended to and did restrain interstate commerce in moistureproof cellophane.

Now, it is further the government's position in adducing its proof to that end that the two agreements just read implement that understanding. However, our subsequent proof is designed to show that in the interpretation of these agreements and in their operation certain facts were brought into play with regard to these restraints that are not within the four corners of the agreement. They come under the broader heading of the understanding. So my analysis at the moment is to be restricted to what is presently in evidence, to-wit: the agreements themselves and the terms of the agreements. We intend to build on from there to the broader scope of this understanding in restraint of trade.

A reading of the agreement of April 26, 1933, covering the nature and scope of the agreement itself, has disclosed that there were two distinct classes of patents involved in this 5596 agreement. There were certain specifically designated existing patents; that is, one class of five patents: The article of manufacture patent, a composition of matter patent, two process patents, and an apparatus patent, which comprised the five patents which Du Pont in its documents in evidence to date has deemed essential to its control of the manufacture and sale of moistureproof cellophane. The so-called product patent was issued on November 26, 1929, and the remaining four issued all on October 6, 1931.

Now, the subject matter of this cross-licensing agreement in addition to encompassing these existing patents also embraced all pertinent future patents. Clause 2 is a covenant whereby Du Pont agrees to grant to Sylvania under any future patents concerned with the manufacture of cellophane combined with a moistureproofing composition, and Clause 3 is a similar agreement in reverse, an assurance by Sylvania to Du Pont, that it, too, will license its future pertinent patents.

Now, ancillary conditions governing the licensing of future patents are found to be contained in Clause 23, and Clause 23 applies to the operations of both of the parties. Thereunder each party agrees to patent all future improvements, and according to the language, waives the right to protect such improvements as trade secrets. Thus all patent improvements must be made known and become available under the scope of this agreement to both parties to the agreement. Beyond that, when 5597 new inventions are marketed the other party shall have a right of disclosure of all applications relating thereto; and even though the invention is still in the application stage, the application being necessary as a result of the previous clauses of 23, said party shall have a license to operate under said applications even before the patent is issued.

It is apparent, then, that this agreement differs vastly from a simple license to manufacture, use, and sell under existing patents.

The Court. That was not my question that I asked you a half hour ago. It is Where does this agreement differ from the orthodox agreement which results in the settlement of a patent infringement suit where one of the parties, to-wit, the defendant, who is sued, agrees to take a license and pay royalty, and then the parties say that in order to forestall litigation between themselves they shall enter into mutual running covenants? That type of agreement you can go out into the files of this Court and find X number, and that is my understanding of how patent infringement litigation is usually settled.

The question I put to you was, With reference to Government Exhibit 2487, which is the Du Pont Sylvania agreement, where does it differ? You hinted to me a moment ago that perhaps it was different in the way it was carried out, and you will show it by later proof. If that is the answer I am quite content to 5598 await that further evidence. But at present I want to know, directing my inquiry to the paper before you, why is it different? Is it sui generis? Does it have some characteristics which you condemn?

Mr. Minicus. Fortunately, your Honor, I don't think we have to wait. I think we can find a difference here. I think the differences will become more apparent as we go along, but I think they are clearly marked right here. I haven't completed by any means, but I have only devoted myself to the scope of the technology involved so far. As to that, in your Honor's statement as to settlement of interference proceedings—

The Court. No, settlement of infringement litigation.

Mr. Minicus. Infringement suits. When you spoke of running covenants do I understand that those running covenants included licensing of patents not yet conceived—of inventions not yet conceived?

The COURT. If the parties want to so agree to keep out of one another's hair in the court room.

Mr. MINICUS. I submit to the Court that that is a practice that has been condemned by the Supreme Court of the United States; and, furthermore, in this instance it is very different as it is in so many of these things that we have to consider in this case, because the parties agreeing here—and this is the basic difference all the way through this thing—are not only dominant, as the court in
the Cracking case said, but they are the entire industry;
5599 and that, we maintain, is really the most operative factor
in this entire agreement; that here we have a patent agreement on some very basic patents where the two parties agreeing as to those basic existing patents and all future patents relevant to them will be cross-licensed between themselves.

The COURT. Then your point is, if I understand correctly, this agreement, Government Exhibit 2187, is illegal per se?

Mr. MINICUS. At least as it stood in its unamended form, prior to the amendment.

The COURT. Then after 1938 it was transformed into a legal agreement?

Mr. MINICUS. Yes, your Honor.

The COURT. You see, my difficulty, Mr. Minicus, is I am trying to get my hands on the illegality that you are urging upon me.

Mr. MINICUS. No, we still maintain that after the amendments of 1938 the agreement itself was still illegal per se, but we say that we don't have to narrow ourselves to a consideration of whether the terms of the agreement were illegal per se, because subsequent evidence will expend it to the point where there is no doubt of the illegality. But we do maintain that by its terms both of these agreements are illegal. Again I must reiterate for emphasis that
a very important factor is the dominance of the parties in-
5600 volved in this relationship in that particular industry.

Now, I had mentioned that there was a considerable difference between this agreement and a simple license. Some of the other differences I mentioned are that it not only went to future patents, which we say is a subversion of the patent laws, to license patents not yet conceived, particularly under an arrangement like this, but it went beyond that. If went to patents that had not matured into patents yet; it went right back to applications and applications in the Patent Office were subject to this thing; and it went beyond that; because if one of the parties to this arrangement had discovered something that they did not want to patent, they waived their right to maintain it as a trade secret and they had to take an application and prosecute it to a patent so that it would be available to both of the parties to the arrangement. I think those are certainly terms and conditions, particularly when they deal in futuro, that are not ordinarily found in a simple licensing agreement on an infringement action. Furthermore, this is a cross-licensing agreement and not a licensing agreement.

5601 That is the basis for our position that this agreement is more in the nature of a trade agreement designed to embrace the entire operations and technology of the industry. I think our position there is further borne out by, as I mentioned, the undertaking to grant all future licenses, and the fact that I have also mentioned that future applications were subject to automatic transfer.

In that regard I think a very interesting situation could be positive. What would it be should an application be filed in the Patent Office which failed to mature into a patent? Whichever party was involved in this case, the applicant would have forfeited his residual right of maintaining the invention as a trade secret. So that it is in that manner that the first proposition that we find in clause 23 insisting upon the divulgment of all trade secrets is made effective, because here if one of these parties had failed to get a patent on their invention, normally they would have been able to withhold their knowledge as a trade secret, but that was not even possible under this agreement. The entire technology of the industry both present and future was the subject matter of this agreement.

As to the term of the agreement, clause 5, as I read it, stated that the duration of the agreement shall extend to October 6

The Court. Well now, to the extent that you have

5602 just referred, who was not protected under that arrangement? That was mutual, was it not?

Mr. Minicus. That was mutual. I simply point it out to show the extent to which all of the technology was brought into this thing.

The Court. Du Pont had not suffered as much as Sylvania on that basis.

Mr. Minicus. That is true, but it takes it without the scope of a patent agreement, I believe, and brings in subject matter that is not patented. Both parties are very well protected, and the covenants are reciprocal all the way through.

The Court. Is there any law condemning the mutual exchange of trade secrets?

Mr. Minicus. None at all.

The Court. Well, I am not getting your point.

Mr. Minicus. I bring that in at this time only to show the scope of the agreement, how far this thing goes, that there is

no technology in the industry that was not subject to it. We are not alleging here a restraint of trade, your Honor; we are showing a monopolization of an industry, and here we have the technology of the industry, all of it, being brought within the scope of this agreement. We have not seen the operation of the
agreement yet and the only point I am making at this time
5603 is that there is no technology in the industry that is free
of it, and there is nobody else in the industry and no other
technology, and again that it is technology that is not even in existence at this time; it is technology that may be acquired at some future date.

I would like to turn now to clause 5 under the heading of the term of the agreement. Clause 5 states that the duration of the agreement shall extend to October 6, 1948. This statement is immediately qualified by enlarging the relationship between the parties to last until the expiration of the final patent licensed prior to October 6, 1948.

Mr. Gesell. Now, we are getting so beyond the agreement that I have got to interrupt, your Honor. It is only with respect to any patent which is being used as of the date of the expiration of the basic patents in October, 1948. There is no general extension.

The Court. Then what happens?

Mr. Gesell. After the basics expire in October, 1948, then the licenses continue as to those patents which were being commercially used as of that date, but only as to those, for the life of those patents.

Mr. Minicus. I am glad Mr. Gesell brought that out. That is a very important point. But even so, as to those patents that are being used within the terms of the agreement, it would be
possible for the relationship to have continued down to
5604 1965, it would be possible within the terms of the agreement,
and the product patent was to expired in 1946.

Leaving the scope of the agreement, I would like to turn to certain features in the terms of the agreement that we consider and offer the Court as exclusionary of all others than the parties to the agreement.

The plaintiff contends that this cross-licensing arrangement was entered into by both parties with the intent of exclusively pooling the entire technology relating to moistureproof cellophane. In other words, that the two producers, whose output constituted 100 per cent of the entire domestic supply available to the industry, agreed to foreclose the technology from any and all potential competitors.

The Court. Well now, in 1933, with the exception of Celon, who could they have invited to join them in the agreement?

Mr. Minicus. Our contention does not run to the situation as it was in 1933 but how it might have been after 1933, your Honor. Whoever else might have come along between 1933 and 1947 was excluded also. As a matter of fact, there was Celon in 1933. They were not manufacturing moistureproof cellophane and never did. There was the Visking Company in 1933, manufacturing sausage casings but they were not interested in moistureproof sheeting at that time. There were all the rayon manufacturers, manufacturing rayon yarn—they were not manufacturing cello-
phane then but they were always potential competitors. Ac-
5605 cording to this agreement we find at least the seeds in this
agreement of exclusion of any of those people should they decide to come along later on and moistureproof cellophane. And we shall see under the operation section of the agreement, that is, the agreement in operation, that there were people that came along and wanted to moistureproof cellophane.

Now, the exclusionary effect is in large degree to be found within the understanding, which means we will have to turn to the interpretation in the operation of this relationship to find the principal facts under that. But it is our position that the seeds of the exclusion are found in the terms of the agreement itself.

The Court. I am glad you put it that way because I was having difficulty accepting the proposition that two parties can agree to exclude somebody who is not in existence. I mean, that is simple logic. I do not see any answer to that.

Mr. Minicus. We believe, your Honor, that it is very possible for two people to perform certain acts in the industry, such as the cross licensing of patents, that will have the inevitable effect of discouraging anybody else from ever trying to get into it.

The Court. Well, of course, I will not get that from the agreement as such. I will have to get that by proof that will follow.

Mr. Minicus. That is correct, your Honor. We say
5606 simply that the indicia are in the terms of the agreement.

The Court. The reason I inquire so frequently, Mr. Minicus, is that unless I grasp the significance of this agreement which you yourself suggest to me is one of the six leading in your case, I will have no starting point to follow through the rest of your theory.

Mr. Minicus. May I state, your Honor, I appreciate your questions.

Now, where do we find what I have said are the seeds of the exclusionary operation of the understanding in the terms of the agreement? Clauses 1, 2 and 3 state that the licenses thereunder shall be non-exclusive. That does not sound like it. Nevertheless, clause 17 of the agreement expressly requires mutual consent by both parties as a prerequisite to the granting of additional licenses under the moistureproof patents. In other words, if a third party desired to become licensed under Du Pont's so-called article of manufacture patent, the basic product patent, and they had all the requisites of being a fine manufacturer of moistureproof cellophane, and they came to Du Pont while this agreement was operative and Du Pont had good reason for wanting to license them under their own patent, they could not do it. They could not do it unless they went to Sylvania and were able to acquire Sylvania's consent to license a third party under a Du Pont patent.

5607 This thing worked in reverse, too. If we assume that some of the Sylvania inventions during the course of the operation of this agreement were of great value and Sylvania wanted to license somebody under them, maybe to relieve themselves of this heavy burden of royalties that they were under an obligation to pay, they could not license a third party under any invention that they had made and patented until they went to Du Pont and got the consent of the Du Pont Company to license this third party under a Sylvania patent.

So whereas the licenses are stated to be non-exclusive in their operation, they must perform an act exactly in the same manner as an exclusive license, and it is our position that this business of calling them non-exclusive licenses and then requiring mutual consent on the other hand is merely a subterfuge, and a pretty clumsy one, to disguise the real intent and purpose of this agreement, which was to form a closed patent pool between the only two producers in the industry so that nobody else could ever break into it.

Now, our contentions in this regard have further support in the terms of the agreement themselves. Prior to the amendment, paragraphs 13 and 15 certainly buttress everything I have said up until now, that the parties considered this common property for themselves and for nobody else, no matter whose patents were involved, whose inventions they were.

Clause 13 provided that the returns from any damage actions brought against infringers of these patents was to be 5608 split between Du Pont and Sylvania. This applied regardless of whose patents were being infringed and regardless of which party was the plaintiff in the action.

There we have another situation. If somebody had come along and infringed a Sylvania patent, either Du Pont or Sylvania could sue on it, but whoever sued there would have to be a splitting of the fruits of the action.

Another interesting point under that arrangement was that this division of the fruits of any infringement suit that was brought by either of the parties, regardless of whose patent was involved, would be split according to percentages of sales governing the entire agreement, that ratio starting at 20-80 and working up and down one point each year.

Clause 15 in like manner provided for the splitting of costs incurred in defending infringement actions brought against either of the parties to the agreement, when such infringement resulted from operations under the moistureproof patent. Here again we have that concept of a common property in all of these patents.

It is very true that the amendatory agreement dated July 12, 1938 altered the phraseology of the basic agreement of April 26, 1933, with regard to these clauses. Thus, as to clauses 1, 2 and 3—clause 1 licensed the existing patent and 2 and 3 the future patents—they were changed to provide for exclusive licenses,
5609 and the mutual consent clause providing for mutual consent to license third parties was done away with through the cancellation of clause 17.

However, aside from the substitution of the terminology, it is very difficult to perceive any difference in the legal effect accomplished by at least this change in the amendatory agreement. There is no doubt that this basic agreement in April of 1933 looked very much like an exclusive agreement, and we say it was, although it specifically states that it is a non-exclusive agreement, this time they just faced up to the facts of life and re-wrote the agreement and admitted that it was exclusive. But whatever the terminology was, we shall see, as our proof is adduced, that the legal effects of this amendment at least were the same before the amendment as they were after it, that that part of the amendment did not change the contract one iota.

It is also true that in the general cleaning up of the agreement of April 26, 1933, the splitting of costs of litigation for prosecuting infringement suits and the splitting of damages for defending infringement suits provided for in clauses 13 and 15 were eliminated through cancellation of those clauses. So it is true that after 1938 the Government admits that it is necessary to look beyond the terms of the agreement to ascertain the real effect of the amendments exerted upon this community of interest which we say has been established for moistureproof cellophane by the agreement of April 26, 1933.

5610 In addition to this design to exclude other competitors who might come into the picture in the future, potential competitors, or other persons who for some reason or other might want to moistureproof cellophane, we find some restraints in this agreement of an entirely different variety. These restraints we maintain are designed to suppress Sylvania's operations.

Now, consider the royalties for a moment. For Sylvania to operate at all under this agreement it had to assume a cost item in the form of royalties. Clause 6 provided that Sylvania paid a royalty of two per cent of the net selling price on all licensed products, and clause 8 provided for an additional two per cent royalty for operations under any future patents covering radical departures from the original group of five patents.

Du Pont also became subject to royalty payments but only in the event that it operated under some future patent of Sylvania, and only when such patent was based upon an invention which was a radical departure from the original group of five.

I think our evidence will show as it is adduced subsequently—I don't think there is any contest of the fact that Du Pont never operated under any of the Sylvania patents; they took license under approximately nine of them; they never operated any of them; I think we will be able to show that they never intended to operate under them.

There is another factor in this royalty picture that
5611 is of even greater importance, much greater importance, and
that is what we maintain to be the imposition of sales quotas through this subterfuge of the imposition of exorbitant royalties. In other words, in addition to the royalties provided in clauses 6 and 8, by clause 11 Sylvania was to pay an additional royalty of 20 cents per pound, or 30% of net sales, whichever is greater. That was to be paid on all moistureproof sold in excess of 20 per cent of the combined sales of Du Pont and Sylvania during the calendar year 1933. In other words, after somebody had figured out what the combined sales for both Du Pont and Sylvania were in the year 1933, if Sylvania had sold more than 20 per cent of that total, they would be subject to a royalty on that excess of 20 cents per pound, or 30% of the net sales, whichever is greater—that is, 30% of the value of the sales.

We have seen that from about 1939 through 1946 300 moistureproof cellophane sold at approximately 42 cents a pound. It was quoted at that on the price lists. It could sell for less according to the discount schedules. Now, if 20 cents per pound was the greater, that cut Sylvania's margin during that period down to 22 cents to operate on and take a profit.

Mr. Gesell. That is not correct, your Honor. That is not the way that royalty operated. I want to note that objection.

Mr. Minicus. Who can say how the royalty ever oper-
5612 ated because it never did operate. I am only talking
about the terms of the agreement and what the terms of the agreement say. The terms of the agreement specifically said it must pay an additional royalty of 20 cents per pound, or 30% of

the net sales, whichever is greater. I don't see how that can be missed. That was not the only royalty. I have forgotten about one other, 2%, or 4 cents a pound on top of that. So if it is 42 cents, it is 20 plus 2 or 4, which leaves them about 20 cents a pound to operate on, and the terms of the agreement are quite clear. I don't see how anybody can say it ever operated that way because it never operated: Sylvania never sold in excess of the amount, and it is pretty certain they never would either. For each year during the nine-year period subsequent to 1933 one per cent was to be added to Sylvania's total before it was necessary to pay this exorbitant royalty, and after the passage of the nine-year period, the percentage of combined sales which Sylvania could make without imposition of the additional royalty of 30%, or 20 cents a pound, was fixed at 29% for each succeeding year.

I think I have made it quite clear that the Government contends at this time and intends to prove through subsequent documents that this was never a royalty payment at all. It is very similar to the penalty clause in some contracts, and that is exactly what it
was intended to be. In fact, it was even intended to go be-
5613 yond being a penalty; it was intended to be an absolute bar
of any sales by Sylvania beyond that amount—in other words, it was a quota arrangement.

Now, Mr. Gesell has said—

The COURT: I am going to stop in a moment because I have a long distance call coming in, but before tomorrow morning's session will you chart on the blackboard for me the contract royalty position as you interpret it? Put it there for me on the blackboard and, Mr. Gesell, will you look at it before I come on the Bench tomorrow morning and be in a position to point out if there is any disagreement between you, because I haven't quite gotten it this afternoon.

Mr. GESELL. Yes.

The COURT: Adjourn Court to tomorrow morning at ten-thirty.

(At this point the trial was adjourned to Wednesday, April 25, 1951, at 10:30 o'clock a. m.)

* * * * *

5616 WEDNESDAY, APRIL 25, 1951, 10:30 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. Your Honor, there are two preliminary matters, if I could take just a moment at the beginning.

You will recall that at page 1819 of the transcript I agreed to supply copies of the various limitation orders which were issued in wartime governing cellophane and the citations to the Federal Register. I have a set here with the Federal Register citations and copies of all the pertinent orders. I will hand a set to the

Court, if I may, and a set to Mr. Minicus. These were the documents the Court agreed to take judicial notice of at that time.

The other open matter relates to the testimony of Mr. Cook at page 2212 of the transcript. A question arose as to the relative rates of growth of Du Pont and Sylvania, and rather than make the computations on the witness stand, it was agreed that we would prepare a schedule; show it to Mr. Cook, give him an opportunity to check it, and then we would bring it forward. Mr. Cook has checked the schedule which I now hand up to the Court and agrees as to its accuracy, I am so informed, and I would like to have that put in the record as part of Mr. Cook's testimony. It is simply a computation on those production pound figures showing the
5617 relative rates of growth year by year.

Mr. Minicus. We have no objection to this going into the record in Mr. Cook's testimony, providing it is shown it went in on cross-examination.

Mr. Gesell. Of course.

The Court. I don't mean to be pettifogging but how do we get a writing into evidence on cross-examination?

Mr. Gesell. This is as though he had testified to these figures on cross from the schedule, and we are using the schedule only as a matter of convenience for the parties.

The Court. Well now, for the purposes of the Clerk and his records, how will it be marked actually?

Mr. Gesell. My notion was that we would just set it in the transcript as the information that Mr. Cook would have given had we taken the time on the stand for him to make those particular computations.

The Court. Off the record a moment.

(Discussion off the record.)

(It was agreed that the aforesaid document would be inserted in the record as page 2212-A.)

Mr. Minicus. Your Honor will recall that toward the close of the day yesterday the Court directed certain questions to me relative to the legality per se of certain terms in these agreements. I answered the Court, but in reading the transcript last night
5618 it occurred to me that the answer could have been more complete. You were particularly addressing yourself at the time to the legality of the clauses whereby it was agreed that future patents would come within the operation of this agreement, and the Court stated at that point that there were a great number of patent licenses that had been executed as the result of interference and other patent proceedings in this Court that did exactly that matter.

If the Court will, I would like to dwell on that for just a few moments before we pass on to the other matters we have before us this morning.

The Court. You see, what was in my mind was this: I want to know, as I follow your theory of the case, whether we start with an illegal contract and it flows through its path of illegality, or whether we had a valid legal contract between Du Pont, vis-a-vis Sylvania; but that traditional orthodox contract was put, due to the combination of the parties, to an illegal use, and it was as simple as that.

Mr. Minicus. I understand perfectly now, your Honor, and I do want to take the position that we do start with the understanding, which is broader than the contract, but the understanding was originally implemented by the contract, and it is our position that the contract is most definitely illegal in its terms, without going any further. I would like to draw a few cases to the Court's attention, if I may at this time, because I simply said yester-
5619 day that the Supreme Court has held such and such to be
the case. I would like to delineate briefly how the Court has held that because it is not too clear on a reading of the basic Supreme Court case.

5620 The Court. Now, bear in mind that I have two situations in mind. One is where parties go out and enter into agreements which look to a violation of the Sherman Act; on the other hand, where a plaintiff sues a defendant in the traditional patent infringement suit and the parties get together and say, "It is more economical for us to keep out of the court room, so let us settle our differences." That was the other situation I had in mind.

Mr. Minicus. That is true.

The Court. I want to know into what category the government placed the facts of the case at Bar according to the government's theory. That is all.

Mr. Minicus. Well, the government most definitely places this agreement in a category of that where the two dominant interests in the industry get together for the purpose of bringing all of the patents and technology into the industry into one pile or pot and manipulating them from there on as common property for the purpose of controlling the industry rather than operating under the patent itself.

I think the closest early situation we have to this one, your Honor, is the Standard Oil Company of Indiana against the United States; and in that case I might point out that ultimately the decision here was held for the patentee, but it is quite obvious in the court's line of thinking that we are brought by that
5621 case into a position where we can have a standard to decide
this agreement before us.

In the Standard Oil case that involved a cross-licensing agreement of patents among the four producers of gasoline who then had patents on the oil cracking process by which gasoline was extracted from the residue left after distillation, and the cross-licensing came about in the settlement of a patent infringement suit. The Circuit Court of Appeals there held that the agreement was in violation of the anti-trust laws. Before the case reached the Supreme Court, however, certain restrictive clauses such as those restricting the freedom of the parties individually to issue licenses under their own patents alone or under the patents of others and restrictions on the quantity of gasoline to be produced and reiterated acknowledgements of the validity of the patents involved, as well as further restrictions, were cancelled from the agreement. I understand they were cancelled at the suggestion of the Circuit Court, so they were not before the Supreme Court.

The only question left for the Supreme Court to decide was whether a cross-licensing agreement made as a settlement of infringement litigation by the patentees who at the time of the suit controlled only 55% of the production of gasoline through the oil cracking process, which process was only used in the production of 26% of total gasoline production—and the agreement fixed the amount of royalties to be paid by the sub-licensee, which
provided for a division of royalties among the patentees,
5622 the question was whether that agreement was in violation
of the anti-trust laws.

One very pertinent point there that we can see, we have only 26% of total gasoline involved, and of that these parties only had 55, so we are cut down to about 14% of the entire supply.

The Supreme Court there held that a cross-licensing agreement with clauses providing for fixing a division of royalties where there was no domination of an industry or restraint of trade was not a violation of the Sherman Act, and that was its holding in the case; but it very specifically pointed out that such provisions would be illegal where domination of the industry exists.

Now, we maintain that the Standard Oil case in itself is sufficient authority to support a holding that a cross-licensing agreement with restrictive clauses, particularly restrictive quotas of production allocated to the parties of the contract, is in violation of the anti-trust laws when the parties to the contract are, as they are here, the sole producers in the industry.

It may be that the draftsman of the Sylvania-Du Pont agreement attempted to make it conform with the interpretation of the Standard Oil case. That is a very strong possibility because of the fact this agreement was drawn just two years after the hold-

ing by the Supreme Court in the Standard Oil case.
5623 If that is the case, they certainly fell far short of accomplishing their purposes. The restrictive clauses which were cancelled in the Standard Oil agreements are contained in this Sylvania-Du Pont agreement. That is combined with the fact that Sylvania and Du Pont together were the sole domestic producers of cellophane.

Your Honor mentioned that point to me yesterday and you said, "What about that? There is nobody else here to take a license."

Well, I don't think that the fact that instead of having 60, 70, or 80% of the industry we have 100% here ameliorates the effects of the agreement. It just makes it stronger. It is the old story that Judge Lerned Hand was faced with in the Alcoa case. He said sure, if you have 50, 60, or 70%, a substantial amount of the industry, agreeing to fixed prices, you have a restraint of trade that is illegal per se. How about the situation where you have 100% of the industry and the price is just set by the operation of that 100% unit? You have exactly the same effect as you do if 60 or 70% are fixing the price. Therefore, this activity, if logic is to be followed, must be illegal per se also.

Now, we submit to the Court that the Cracking case presents the most satisfactory delineation of the illegal and the legitimate in these pooling arrangements; that is, it did present that
5624 prior to the drafting of this agreement that we are considering now. The court there implicitly recognized certain standards as aids to the resolution of any given case. These factors include the necessity for the pooling arrangement. It very often happens that when people cross-license there is a very strong necessity, as your Honor pointed out yesterday, where two parties have patents on a particular process and neither one can operate in the presence of the other because the claims on one dominate claims on the other and there is an impasse; there it very often happens that they cross-license, so that both can operate, and the public benefits by the production of a new product. That was not the case here.

5625 Here only one of the parties had patents. There were five existing patents as the agreement very clearly shows. The other party at that time had no patents at all. So there was no compulsion to cross-license in this means because one or the other or both of the parties were blocked by the existence of this patent, or patents.

Another criteria which we gather from the Cracking case is what was the nature of the restrictions imposed on the members of the pool. Now, there is a bipartite viewpoint to that. First, there are the restrictions on each other, and secondly—and we consider the most important—the restrictions on outsiders.

The third criteria is the ability of an individual to compete with the pool.

Another is the competitive conditions in the industry.

Finally—and the one that we consider the most important of all—is the extent of control exercised by the cooperating patentees.

Now, the Court's direct inquiry to me yesterday was directed to the legality of cross-licensing future patents under which the inventions had not been conceived at the time of the agreement. We stress that a line of recent decisions has established the illegality of such future licensing beyond any doubt. A recent case, Transparent Wrap Machine Company v. Stokes, 329 U. S. 637, contains this statement:

5626 "We are quite aware of the possibilities of abuse in the practice of licensing a patent on condition that the licensee assign all improvement patents to the licensor. Conceivably the device could be employed with the purpose or effect of violating the anti-trust laws. He who acquires two patents acquires a double monopoly. As patents are added to patents a whole industry may be regimented. The owner of a basic patent might thus perpetuate his control over an industry long after the basic patent expired. Competitors might be eliminated and an industrial monopoly perfected and maintained. Through the use of patent pools or multiple licensing agreements, the fruits of invention of an entire industry might be systematically funneled into the hands of the original patentee."

The Court goes on:

"Congress, however, has made no specific prohibition against conditioning of a patent license on the assignment by the licensee of improvement patents, but that does not mean that the practice we have here has immunity under the anti-trust laws. Indeed, the recent case of Hartford Empire Company against the United States, 323 U. S. 386, dramatically illustrates how the use of a condition or covenant in a patent license that the licensee will assign improvement patents may give rise to violations of the anti-trust laws."

Now, admittedly we don't have an assignment back in this case; we have a license back of future patents. But I
5627 think the cases picked this up, this Transparent Wrap case, and carried it forward to the position we are urging here.

The COURT. Let me see if I understand that language clearly. If you own a patent and you give a license to Mr. Gesell, you say that you cannot insert in that agreement a provision that in the event he in turn invents an improvement on the original patent you cannot have a license back for the improvement? There would be something illegal about that?

Mr. Minicus. Not under the patent laws, your Honor, only under the anti-trust laws, and for it to be illegal under the anti-trust laws we have got to have the position we are striving for here, that is, there must either be dominance of the industry or some restraint of trade involved.

In other words, that is exactly the Cracking case. The Cracking case was sent back by the Supreme Court, and the lower Court found no restraint of trade and no dominance in the industry, so they upheld—well, they decided then for the patentee. But where you have these other factors, these factors of dominance or restraints of trade or conspiracy——

The Court. Well, according to your theory, if I can follow it, once you find dominance and control then everything that the parties touch becomes stigmatized.

Mr. Minicus. Exactly, your Honor, and there is nothing original about that. The Courts have been saying right from the
5628 common law through the statutory law that what is legal done by one might very well be illegal when done in consort. This is nothing more than a very logical extension of that idea. When the one becomes so dominant in an industry that it becomes equivalent to the combination of many parts of another industry, we have the same situation, and Judge Learned Hand found that in the Alcoa case.

I honestly believe and strongly urge that the cases today say that there is a greater obligation upon a dominant corporation in its actions with its competitors and others in the industry than there is in a corporation that has ten or fifteen per cent of the industry. And I don't think there is anything wrong in that line of reasoning. I think these large corporations have got to recognize their obligation to the public as long as they control 75 and 80 per cent of the total industry.

Now, if I may carry my thought further, we come again to United States v. National Lead, 63 Fed. Supp. 515. Judge Rifkind there gave as one of the reasons for condemning the agreements in issue the following:

"True, the net work of agreements did involve cross-licensing of patent." Now we are in the field of cross-licensing. "But it was not limited thereto. The agreements applied to patents not yet issued and to inventions not yet imagined. They applied to commerce beyond the scope of any patents. They extended to a time beyond the duration of any then existing patent."
5629 Then he recites the Ethyl Gasoline Corporation against United States, 309 U. S. 436. I continue reading: "They

embraced acknowledgment of patent validity with respect to patents not yet issued nor applied for and concerned inventions not yet conceived."

Judge Rifkind's decision was affirmed by the United States Supreme Court subsequent to its decision in the Transparent Wrap case.

That the decisions in the Transparent Wrap and National Lead cases are compatible and actually based on the same line of reasoning is vividly portrayed in United States v. General Electric, 80 Fed. Supp. 989. That was the Carboloy case, your Honor, that was heard before Judge Knox in New York City about two years ago. This case involved licensing by a dominant producer on the conditions that the licensee would assign or cross-license future patent rights. In condemning this licensing scheme the Court spoke of the Transparent Wrap case as follows:

"In that case, however, the contracting parties were two relatively small concerns and were without extensive control of market conditions."

Then noting that the National Lead case referred to arrangements between the leading producers in the field, the Court stated,

5630 "The trade position of the present defendants closely approximate that of the defendants in the National Lead case and not that in the Transparent Wrap case. The employment of basic patents or patents which may be basic to compel the transfer of future patent rights is condemned per se when practiced on a scale which is found to exist in this suit."

Again we have the case of United States v. General Electric Company, 82 Fed. Supp. 753. That is the incandescent lamp case heard before Judge Foreman over here in New Jersey about three years ago. The question of assignment or cross-licensing of future patents back to the licensor was discussed and condemned where the parties were dominant in the industry. The Court stated:

"In the present case, General Electric regimented an industry by, among other things, its acquisition of patents to perpetuate control over the incandescent electric lamp long after its basic patents expired to maintain a dominant position rendering it possible for it to eliminate competition and maintain an industrial monopoly of the type recognized by the Transparent Wrap case to be an eventuality violative of the anti-trust laws. Its aggregation of patents into its control permitted General Electric to monopolize patents. And by so doing it violated Section 2 of the Sherman Anti-Trust Act."

In the General Instrument case, 87 Fed. Supp. 157, this case condemned an analogous arrangement between dominant members of an industry. Therein an agreement between dominant manu-

facturers whereby a patent holding company was created to
5631 hold all present and future patents and to grant licenses, prosecute infringement actions, was condemned. The Court said:

"In this manner the normal patent monopoly with its products of legitimate cross-licensing and royalties is extended to give multiple advantages to individual patent holders dominant in the industry by combining their patents and affording the mechanism to reap mutual rewards greater than their individual patents would justify."

As recently as United States v. Besser Manufacturing Company, a case decided just this year, there was a condemnation of a licensing agreement between the patentees, the two dominant concerns in the industry, and the Court there said, "This deal was the climax. Stearns and Besser were given the right to use the Gelbman and Andrus patents, but exclusively to them, and it was agreed that they were to have the benefit of and any right to use any and all future improvements in patents covering concrete block-making machines that might come from the fertile minds of either Andrus or Gelbman or both."

The Court. What did the Court mean, "this is the climax"?

Mr. Minicus. As I read the case, the Court had been reading a lot about these practices and then finally got to that point.

At a later point the Court stated:

"Unquestionably its purpose was to make certain that
5632 these two giants of industry did not battle each other over patents any more."

Finally the Court said:

"We believe that the contract under question goes further than is necessary to protect the patent monopoly of Gelbman and Andrus. It may well be that an exclusive license to one party would be valid but here the patentees have joined hands with the two largest competitors in the industry and by the terms of their agreement have virtually made it impossible for others to obtain rights under these patents."

The Government submits then, your Honor, that it is evident that cross-licensing arrangements of this type which act to tie up all technological developments in the chosen field, both present and future, are illegal per se when the parties to the agreement are dominant in the industry involved, and most certainly this rationale applies to this case where there are only Du Pont and Sylvania in the entire industry.

Mr. Gesell. If I may interject, I see your Honor is glancing at the blackboard. That is not an agreed statement between us as to the royalty provisions.

The Court. After you finish your discussion of the cases——

Mr. Minicus. I have finished.

The Court. Then will you go to the blackboard and help me.

5633 Mr. Minicus. Yes, your Honor. Mr. Gesell and I have discussed the blackboard illustration rather briefly this morning, your Honor, and it seems that our greatest point of divurgence, as I attempted to explain to Mr. Gesell, is that the royalty provisions in the agreement cover several typewritten pages of legal size and this is rather a small blackboard. We did the best we could to sincerely and honestly portray our understanding of these provisions within the limited scope available.

If I may, however, I think some explanation of our illustration here will clear up the matter.

The Court. Yes.

Mr. Minicus. We have here a first statement on M. T. That means royalties payable on moistureproof cellophane of a type that comes within the five so-called basic patents that were existing at the time of the agreement. There were claims that read on the coating of regenerated viscose cellulose. There was one composition concerning four constituents. There were two process patents and an apparatus patent, and it is fair to assume that the claims there covered one general idea.

Now, if Sylvania manufactured within those claims, either within the product claims or the apparatus claims or process claims, they had, according to Clause 6 of the agreement, to pay 2% on the net selling price of all sales made of that material.

The Court. Was that net or gross?

5634 Mr. Gesell. No, that is not correct, your Honor.

Do you want me to interpose here as we go along or how are we going to do this? I don't want to make it more confusing.

The Court. will listen to both of you whenever you want to interrupt.

Mr. Gesell. The royalty did not apply on all of Sylvania's sales of moistureproof cellophane. It applied only with respect to the sales of moistureproof cellophane made for use within the United States. There was no royalty charged with respect to sales outside the United States.

The Court. I thought there was a restriction that Sylvania could not sell abroad.

Mr. Gesell. There is no restriction, your Honor; there is no restriction on Sylvanias exports and it was free to export in any quantity outside of the United States free of any royalty. The original proposal which was read to your Honor yesterday was that they would combine their sales. That may have been where your Honor got that idea. But the agreement contained no such limitation and expressly recognized their right to sell abroad. So that they paid no royalty on exports. Similarly, they paid no royalty on their imports which they sold.

Mr. Minicus. On the question of exports, your Honor, if Mr. Gesell had explained to me before that we had a
5635 point of difference there I would have accepted that, because I think the records of both corporations will show that exports relative to domestic sales were very small. I do concede that on a small amount of cellophane sold by Sylvania within this agreement they did not have to pay that 2%. As to Mr. Gesell's statement that there was no payment on imports I must take issue, and I think as the record develops we can show that Sylvania's statement shows royalties paid for sales in the United States and for imports. I will wait and let the evidence to be introduced take care of that point. But I do concede that on exports Sylvania did not have to pay this 2%, and of course this 2% applies to the five existing patents and any licenses that Sylvania may take under future duPont patents.

Mr. Gesell. No.

Mr. Minicus. I am coming to that, Mr. Gesell. I have to finish my statement before I can make it complete.

That is, any future patents within the scope of these five basic patents.

Now, as to duPont, in the event that duPont should take a license from the Sylvania Corporation under some future patent that it may acquire within the scope of these five basic patents; that is, of the same general idea as distinguished from a radical departure of conception, then duPont had to pay no royalty under any such license. Now that is covered by Paragraph 6.
5636 If we turn to Paragraph 8 it is apparent that another type of future patent was encompassed within the terms of this agreement, and that is spelled out in quite considerable detail on page 6 of the agreement. The entire page is devoted to setting forth exactly what the parties mean. I think under Subparagraph 3 at the bottom of the page we get summed up pretty well just what is encompassed here. Under the sub-heading 3 they say, "In general a distinct departure in process or product from those described and claimed in the said present Du Pont patents." In other words, what the parties were thinking about here is that one or the other of them might invent something that would be quite a radical departure from the conceptions of these patents. Therefore, under those an arrangement was made whereby Sylvania would pay an additional 2% for all production under this concept of radical departures. That means that you took the 2% that they already had to pay under this and an additional 2% which amounts to 4%.

In the event that Sylvania also acquired a patent that was considered or decided to be a radical departure from the five existing patents, Du Pont took a license under that and operated under that license, then Du Pont would have to pay to Sylvania 2% royalty.

Mr. Gesell. If I may interject, with respect to that development, the agreement provided that each party would pay 2% on the so-called radical departures invented by the other. 5637 It was completely equal as to that. The 4% that is shown there is Mr. Minicus' assumption that if Sylvania operated under a radical departure it would also continue to operate under the basic patents. In such eventuality, which was the case in such instances, they paid 4%; but as to departures, the agreement was completely equitable, 2% each way, and the reason that Du Pont pays zero, as he says, on moistureproof is that that was its invention and Sylvania had nothing to license; so of course it continued to practice its own invention free.

Mr. Minicus. I think the terms of the agreement take care of this equitable argument Mr. Gesell is talking about here.

The Court. Pass that. This is the net selling price?

Mr. Minicus. That is our understanding of Paragraph 7 of the agreement, which gives a definition of net selling price to show what they are basing it on. That is the entire purpose of Paragraph 7, the definition of net selling price.

The Court. I want this scale explained to me.

Mr. Minicus. That, your Honor, arises under the terms of Paragraph 11 and Paragraph 12 of the agreement. The first sentence of the paragraph gives us the proper background for this.

"The royalty payments hereinabove required to be paid by Sylvania as stipulated in Paragraphs 6, 7, and 8 shall be increased by the amount of 20¢ per pound or 30% of 5638 the net selling price of said articles, whichever amount is greater."

Those increased royalties, according to the terms of the contract, apply to sales over a certain amount of the total of both companies. That is, if Du Pont and Sylvania in 1933 sold 100,000 pounds, then Sylvania would be entitled under these lower royalties to manufacture up to 20%.

By Paragraph 12 Du Pont up to 80%.

Mr. Gesell. No, no.

The Court. That is where I am confused.

Mr. Gesell. That is not what it provides.

Mr. Minicus. Without the additional royalty. That may be what we are quibbling about.

Mr. Gesell. No.

The COURT. Well, you go ahead and take me down a couple of more years and then I want you to stop and let Mr. Gesell go on.

Mr. GESELL. All right.

Mr. MINICUS. The agreement then provides for an added increment in each year of 1%. In other words, in 1933 there is no doubt that if Sylvania produced and sold more than 20% of the entire sales of the industry—that is, of Du Pont-Sylvania—these prohibitive royalties became operative. If they sold more than 21% in 1934, these royalties became operative.

5639 The COURT. I can understand the 20¢ per pound, but what is the 30% of? I haven't that in relation to another figure.

Mr. MINICUS. 30% of the net selling price, whichever is the greater. In other words, if 20¢ per pound proved to be greater, they would pay that. If it were 30% of the net selling price and that was greater, then they would pay that. Whichever is the greater on the amounts over these percentages here.

So the allowable share—proportionate share within these lower royalties increased each year by 1% until down in 1942 we get an allowable participation of 29% without the payment of additional royalties.

The COURT. Now, just two questions:

First, did Sylvania ever have more than 20% of the industry's output in any one year?

Mr. MINICUS. Yes, they did.

The COURT. Did Du Pont ever have more than 80%?

Mr. MINICUS. Not after the first year. After 1933 I know it dropped below 80%. It was always under 80% after that.

The COURT. My final question on this phase of the agreement is this: How many years did the last formula you have been discussing operate? From 1933 for how many years thereafter?

Mr. MINICUS. Until the end of 1944, when the agreement of 1933 as amended was reformed and another license agree-
5640 ment interjected.

The COURT. Do you want to take over, Mr. Gesell?

Mr. GESELL. Yes.

In answer to your Honor's first question, the formula never operated at any time under this agreement for the very simple reason that Sylvania never sold a quantity of moistureproof cellophane within the United States in sufficient amount or anything approximating it to bring the extra royalty into operation.

The COURT. I thought Mr. Minicus just told me that it operated down to 1944.

Mr. GESELL. It never did, and Exhibit 1 shows that, and all of his other exhibits show that at no time did Sylvania sell for use in the United States a quantity of moistureproof cellophane sufficient to require it to pay any extra royalty.

The COURT. All right. That is a factual question which I will ultimately have to resolve, and I am not going to pause at this time to have you both cross swords on it.

Are there any other observations you want to make of his interpretation?

Mr. GESELL. Yes, your Honor.

If I may, I would like to take you through an actual example, because I think that will bring out my points clearly, and for your Honor to follow the figures if I could hand up a copy of this computation I think you will see it.

5641 We have taken the 1935 figures and rounded them off in order to make it easy to deal with. There in that year we will see that Du Pont sold 30 million pounds and Sylvania sold 7,500,000, or a total of 37,500,000. Now, we assume that Sylvania actually sold 10,000,000 pounds, which your Honor will recognize is a substantial increase over the amount it really did sell. You would first have to determine what the industry total would be on that assumption. In other words, it would be 40,000,000 pounds. Then under the agreement you will see for 1935 on that schedule, that Sylvania's percentage was 22. So they were free of any extra royalty on this assumption for 8,800,000 pounds, and they only had to pay the extra royalty of 20¢ a pound on the excess over that, which on this assumption would be 1,200,000 pounds or a total of $240,000.

Now, that extra royalty applied only with respect to the excess, not with respect to the total production. So that when you take that $240,000, which is on the excess, as your Honor will see from this writing, and apply it against the total of 10,000,000 pounds, the extra royalty for their production is only 2.4¢ a pound.

Now, your Honor understands that this never happened, that there never was an instance where their sales exceeded the specified percentage. But what I am pointing out to your Honor is that under the operation of this formula it was not as intimated yesterday a penalty which applied to the total production
5642 of Sylvania the moment that exceeded the specified percentages. It applied only to the amount in excess, which when measured against the total production leads to quite a different conclusion.

5643 Mr. GESELL. Have I made that clear?

The COURT. Yes.

Mr. GESELL. The other point is this, that there was never under this agreement at any time, by formula or otherwise any limitation upon the amount of cellophane which Du Pont could make under its own patents. The way this table is set up suggest that Du Pont undertook, for instance, in 1935 that it would only make 78 per cent of the cellophane. That is not the fact. There was no limitation of any kind upon the amount which Du Pont could make, and that percentage only relates to what it would have to pay in respect of any production which it made under any Sylvania patents licensed to it, and since, as Mr. Minicus stated yesterday and the record shows, it never used any, that feature of the contract never was operative.

I emphasize again that this whole formula related only to sales which each made under the patents of the other, not under their own patents, and related only to royalties for sales made for use within the United States.

Mr. MINICUS. I had not intended to get into the operation of this thing, your Honor——

The COURT. I am sorry I asked you to use the blackboard.

Mr. MINICUS. We will have a consideration of the operations later on, but I would like to explain a couple of things inas-
5644 much as Mr. Gesell's, shall we say, example has got us into the operation of this thing.

The Government never maintained that these extra royalties had to be paid on the whole amount if the production exceeded twenty or any of these other percentages. We made it quite clear that Sylvania only had to pay these additional high royalties on production over these amounts. That is the basis of our position.

Mr. Gesell has given us an illustration or an example where by taking the excess royalty accruable on production or sales over those amounts and spreading it over the whole mass, it only came to 2 per cent, or 2 cents per pound. But that is not what we are saying. We say they only have to pay these royalties on moistureproof cellophane under these amounts, but when they get over these percentages, bang, they are hit with that (indicating on blackboard).

Now, what does that mean? During most of the period, certainly down in these years here (indicating the years '39, '40 and '41 on blackboard), during a large part of that period moistureproof cellophane sold for 41 cents a pound—that is on the quotation of the price lists—and the average prices, because of discounts and so on, were below that. But we will take 41 cents a pound as quoted in the prices. Now, at 41 cents a pound, taking this 2 per cent, assuming it was in the lower royalty, plus this 20 cents a pound here, and we are up over 20 cents a pound on a 41-cent
5645 item. That means that for all amounts over 20 per cent, Sylvania had to pay more than half of its gross realization on every pound to Du Pont. Then out of the 20-odd cents left they had to run their plant, pay their help, get a factory, and make a profit. Well, I think it is pretty apparent that if there was any profit at all it would not be much, and I think as a matter

of fact that that would have caused them to sell anything over these percentages at a loss. So there was no use in their making it.

Mr. Gesell has made a big point of the fact that in no single year did Sylvania produce moistureproof cellophane in excess of these percentages. We agree to that. That is so-so. They would have sold at a loss if they had. Furthermore, he said they never approached these percentages. We concede that. They came close a few times, so close it must have made them very nervous, but they never exceeded it.

Why didn't they come right up to the point then? If they were allowed to make 20, 21, 22 or 23 percent in these years, why didn't they come right up to it before the addition of this royalty? Why didn't they make right up to the line of their allotted amount without penalty of royalty? I think that is very simple, too, if you look at how this thing worked, your Honor. These royalties, these exorbitant royalties were figured on a basis of the total production for both companies at the end of the year.

Mr. Gesell. No, sir. It related to sales.

5646 Mr. Minicus. I am sorry.

Mr. Gesell. It didn't have anything to do with production; they could produce as much as they wanted.

Mr. Minicus. That was a slip—they probably produced a lot and sold a part of it.

Now, these percentages were based upon the total sales at the end of the year, and we have seen that sales do not differ greatly from production in this industry.

Mr. Gesell. Now, that is inaccurate, your Honor. This was a quarterly settlement. This was not based on any other basis. They knew every quarter where they were, and the notion that they had to wait to the end of the year to know where they were is not a correct representation.

Mr. Minicus. I didn't say that. I said these percentages were figured at the end of the year. I said nothing about quarterly statement. I said if at the end of the year, when everything was totalled out, sometime around January 5 or 10, or so, they were in excess of 20 per cent, then they would have to pay these exorbitant royalties.

I ask you, in any manufacturing endeavor today, when a man is tooling up at the beginning of the year and getting ready for his production for that year, how can he possibly tell what he and his competitor are going to sell together at the end of that year? It is January 1, 1934, and Mr. Sylvania knows that if he goes
5647 over 21 per cent in that year of the total sales of both companies, he is going to be subject to these exorbitant royalties. Now, he has got to lay out his production schedules. He has got to know how many casting machines he has got to have, and that

would place upon him the burden of prophesying just what he and Du Pont were going to sell for that year, and then say, "Well, I can have 21 per cent of it without paying these royalties."

Now, he would have to figure awfully close to get exactly to the 21 or 22 or 23 or 24 per cent, particularly in an industry that was growing as fast as this one. We have seen from the evidence that Mr. Gesell put in this morning that each year this industry jumped up tremendously, and this fellow had to figure first what the both of them were going to sell at the end of the year in this expanding market, and then he had to figure exactly what 21 per cent would be, and he could not do it, and he did not dare take a chance on going over or he would be selling at a loss.

So when he had twenty-four in 1937, I believe it was, and he sold twenty-three, I believe it was, he came pretty close and he was a pretty good judge.

Mr. GESELL. He was 54 million pounds short and only sold two-thirds of what he was allowed to before he got the royalty.

Mr. MINICUS. I have figures on that, your Honor, that will make my point quite clear. I said we were going to
5648 come to the operation of this agreement at a later point.
I am sorry that it arose at this time but it was necessary in order to explain Mr. Gesell's example. I will show exactly how close he came to these various percentages each year, and we maintain that this was nothing more nor less than a subterfuge to limit him in his sales below these percentages. It could have no other purpose.

There is one other reference, your Honor, to Mr. Gesell's statement. I would like to say that at clause 10 of the agreement it specifically states that Sylvania agrees to keep records of all articles imported or sold under the provisions. So I maintain that imports were subject to this.

Now, I would like to turn to another clause in the agreement, your Honor, clause 10, which is the one I just had reference to. Clause 10 of the agreement imposed upon Sylvania an obligation to make quarterly reports to Du Pont, setting forth the quantity of the goods imported and/or sold under the agreement and the respective royalties due thereon. That had to be done quarterly.

The Government is not attempting to make a great deal of the inclusion of that term in the agreement. On its face the requirement is innocuous enough and constitutes fairly common practice. If a man is licensed under a patent, he has to make reports so that the patentee will know how much money is due him. The re-
5649 quirement is merely pointed up at this time because subse-
quent evidence will demonstrate that because of the peculiar market structure and the relationship of the producing units in the industry, Du Pont was enabled to obtain and utilize competitive

information which would not otherwise have been available to it and would probably have been unlawful for it to receive under conditions of direct transmission. I am merely pointing up the existence of these quarterly reports at this time as a basis for evidence that is subsequently to come. I am not by many means—and I don't want to be misconstrued in a few minutes—saying I am attaching these quarterly reports. I am not. I am attacking the use that was made of these quarterly reports by the Du Pont Company.

Another restrain on Sylvania is found in clause 13 of the agreement, particularly under the subheadings there 2 and 3, which narrowly limit the right of Sylvania to sue infringers under the patent subject to the agreement. Under sub-heading 3 it was possible for Sylvania to sue infringers of any of the future patents regardless of whether or not the patent involved was owned by it or Du Pont. However, with regard to the original group of five patents, which included the so-called product patent, Sylvania possessed no right to sue, and according to sub-heading 2 of this section, if there was an infringer and Du Pont did not want to sue the infringer, the only recourse Sylvania had was to terminate the agreement. I think we can bring up some evidence at a later point to show why that restriction was 5650 on Sylvania with regard to the five original patents.

Another point I would like to invite the Court's attention to now is found in clause 22. This clause takes care of the acknowledgement of the validity of the patent involved. Sylvania expressly acknowledges the validity of the group of five existing patents, which included the so-called product patent, and as to future patents the language is stated rather indirectly. As to future patents both parties agree not to assist others directly or indirectly in infringing or contesting the validity of any of these patents.

I submit to your Honor, that there is a very broad issue of public policy raised here, particularly in this case. The Government admits that acknowledgment of validity in patent licenses is a very common practice. But under certain circumstances in industrial control it also becomes a very efficient offensive weapon. Now, that theory did not originate with me. Once more we go back to the Gasoline Cracking case, and the Court there discusses the possibility of agreements of this nature and points up the public policy behind them. We all admit that the public have a very great interest in the patent laws and their operation. I believe to some extent they were passed for the public benefit.

Now, as the Court in the Cracking case points out, if you get the really important patent owners, or all of the producers 5651 in the industry, to acknowledge that these patents are valid.

who is ever going to challenge them and how is the public ever going to find out that it is being deprived of operating under these inventions because there is a patent on it? They will never know whether they are operating under a valid or invalid invention. If everybody that would be interested in it acknowledges the validity of that patent, then that patent is never going to be challenged, and for 17 years nobody has to worry very much about the right to exclude.

5652 The argument was not confined to the Cracking case. The General Instrument case, just a year ago, picked up the same point and again pointed out the public interest involved when so many important people in the industry get together and acknowledge the validity of each other's patents, and I say the statement is very clear in there that as to future patents both parties agreed not to assist others directly or indirectly in infringing or contesting the validity of any of these patents, patents that had not even been conceived yet.

I turn now to Clause 25 of the agreement. Clause 25 is rather a peculiar clause in the light of the fact that both parties had agreed not to hold back trade secrets from each other, because Clause 25 states that no right or privilege exists to acquire confidential information regarding patents or process. It seems to us that this obviously means—and it turned out that way in practice—that the license grants did not carry with them any transfer of know-how. In other words, Sylvania got the bare license with the specifications and the claims on it, and they went ahead from there. That is a little bit unusual. It probably has happened in other instances. That is the way it worked in this case.

Now, counsel for the defendant has throughout this trial continuously bespoken the value of Du Pont's secret processes, these
processes under which it manufactured. In this regard it is
5653 interesting to note that Clause 7, sub-headings D and E of
Sylvania's answer to the infringement suit, alleged insufficient disclosure in the descriptions and specifications of the five original patents. We admit that when that went in we did not put it in for the proof of that statement. We said that is what Sylvania claimed, that the disclosures were insufficient. Inasmuch as know how did not pass under this agreement, and since we have Sylvania's statement, and I think it is a statement supported by the fact that it probably did not acquire the information on how to make moistureproof cellophane because the patents had not issued on how to make moistureproof cellophane at the time Sylvania commenced the manufacture of moistureproof cellophane, therefore they must have gotten the information from some other source than the patents.

Mr. Gesell. In addition to two years before they started—

Mr. Minicus. I said the process patents and apparatus patents and all the others.

Mr. Gesell. You didn't say any such thing. The patents had issued, your Honor, before they started. The product patent issued in 1929.

Mr. Minicus: I think we make articles under process patents, your Honor, and apparatus patents and machine patents, and those patents had not issued when Sylvania started to make moistureproof cellophane, so they must have gotten the know-how from
somewhere else; and I think these circumstances cast a new
5654 light upon the very secret nature of these processes, if they
ever were secret.

In this discussion of the relationship between Du Pont and Sylvania with regard to moistureproof cellophane we have limited ourselves to analysis of the terms of the agreement itself. Subsequent proof will be designed to show that interpretation of these terms, by the parties themselves and operations under the agreement, bear out all of plaintiff's contentions. That is, that this relationship was, in fact, an unlawful pooling of all patents relating to moistureproof cellophane, by all the producers of that product in their entirety, and throughout most of the period in which that product has been produced in the United States. Furthermore, this pooling was accompanied by an intent on the part of the dominant producer to suppress and restrict the operations of the lesser producer, and with an intent by both producers to employ their combined patents in such manner as to make all existing and future patents down to the year 1965 unavailable to anyone who might desire to enter the industry.

Mr. Gesell. Your Honor, is this the appropriate time to take a mid-morning recess before I start? Because I think I will be going the rest of the morning.

The Court. Are you going to commence with discussion

Mr. Gesell. Yes, your Honor.

The Court. Are you going to commence with discussion
5655 of GX2487? Because there is a lot yesterday that you did
not cover in the discussion.

Mr. Gesell. I did not intend to spend much time on anything but the agreement.

The Court. You remember that long line of exhibits commencing with Government Exhibit 2482 which had to do with Du Pont's purpose in preparing the infringement suit which it started in this Court and all the minutiae in that situation?

Mr. Gesell. Yes. I thought I would cover that and state our position with respect to it and then go to a discussion of the agreement.

The COURT. All right. Recess for ten minutes.

(At this point a brief recess was taken.)

Mr. GESELL. Your Honor, it is our basic position here that this agreement was a valid patent license agreement within its four corners and that it represented the entire understanding between the parties. We take issue with the government, therefore, on both their contentions that there was some mysterious understanding broader than the license agreement, and we say this was an entirely proper and appropriate license agreement for the settlement of infringement litigation.

Now, to deal first of all with the discussions leading up to the agreement:

5656 The charge seems to be made that this was not a genuine patent controversy. We say it was. We say that we brought a bona fide patent suit against Sylvania for infringement, that there was a genuine patent controversy, and that that controversy was settled by negotiations at arms length.

I don't believe there is any dispute between us that we offered Sylvania a license before bringing suit; and, frankly, your Honor, it is a little difficult for me to see how that was a monopolistic act. We had valid product patents and process patents essential to Sylvania's manufacture, and in those days of the depression we were in a position, had we chosen to assert our lawful patent rights, to put them out of the business of making and selling moistureproof cellophane. However, the fact that before we pressed our legal rights as a patentee we offered them a license in the face of the fact that they had pirated this product and were blatantly going forward in violation of our patent and property rights, does not seem to me to be a monopolistic act. Nor do I think we acted as a monopolist when after issue was joined and suit had been brought, and as these documents show, with confidence of our position, we chose to settle the patent litigation with Sylvania.

5657 We have not got all of the documents offered yet on the negotiation of this agreement. Some of the come later in the Government's evidence; some of them come now. The ones that have been offered seem to me to show simply the routine preparation, the employment of counsel, and the arrangements for bringing a patent suit which we did bring, first here and then in Virginia. There was no question in our mind of infringement and we stood by the proposition we were going to enforce our patent rights. Certainly the negotiations show no agreement or understanding beyond the terms of the contract entered.

So I think what we come down to is a discussion of the contract and its terms which I would like to cover at some length for the purpose of showing you what the contract really provided and presenting to you the authorities that make it pretty clear to us that the contract was valid.

The Court. You are familiar with this record insofar as the documentary proofs are concerned. Do they show that Sylvania was in fact—or at least you alleged it to be the fact—that they were using moistureproof cellophane prior to the institution of the infringement suit in this Court?

Mr. Gesell. Yes.

The Court. That being the case, is there anything in the record as you have found it to sustain the statement made by Mr. Minicus this morning that there was an intimation that you had
5658 passed over know-how to Sylvania prior to the issuance of the patents themselves?

Mr. Gesell. There is not an iota of evidence as to that. It did not happen. Our patent had issued, your Honor.

The Court. My diffiulty is that I do not see how you would turn over know-how to Sylvania as to how to make moistureproof cellophane and then bring suit against them.

Mr. Gesell. We gave them no know-how of any kind before or after the agreement, and where that volunteering of suggestion comes from I do not know. There is no evidence of it. Our patent had issued, your Honor, and our patent, which, as your Honor is aware, is a comprehensive broad patent, does describe what moistureproof cellophane is and what some of the components of the composition are.

The Court. Do you want to clear that up for me now, Mr. Minicus?

Mr. Minicus. Yes. I think I have probably not made my position clear in that regard. I did not mean to imply that Sylvania acquired any know-how from Du Pont prior to the licensing. I said that Sylvania had the know-how and was able to manufacture moistureproof cellophane before the issuance of the process and apparatus patents and they must have gotten the know-how from some place.

The Court. Well, whom did you mean?

Mr. Minicus. There were lots of people abroad, your Honor, manufacturing cellophane.

5659 The Court. I thought you were implying that Du Pont had turned over the know-how to them.

Mr. Minicus. I did not mean to imply that, sir.

The Court. I am not condemning anything you said; it just did not seem rational to me that Du Pont would turn over know-how and then turn around and sue them as an infringer.

Mr. Minicus. That was not my position.

Mr. Gesell. Now, turning to the agreement, your Honor, I guess if it has been said once it has been said twenty times in Mr.

Minicus' discussion that this was a pooling of the technology of an entire industry. I say that is false. This agreement did not relate to plain cellophane at all. That is the first point. There were no licenses as to plain, there were no royalties as to plain, and there were no provisions as to plain. None of Du Pont's plain cellophane patents at that time were licensed under the agreement.

The next point is that even within the narrow moistureproof area of this agreement there was no exchange of technology, of know-how, of any kind. We did not give them our know-how. They did not give us theirs. The talk about this being a broad trade agreement embracing the technology of an industry ignores the terms of the contract. And it also ignores the terms of the contract, your Honor, to refer to this as a cross license. This was not a cross license. When this agreement was entered into,
it was a one-way street. Sylvania did not have a single
5660 patent. All of the patent rights that were licensed at the
time the agreement was entered into were rights of Du
Pont's ownership which passed to Sylvania.

In the history of this contract which continued in effect until 1945, with the one amendment which has been referred to in '38, there were nine patents licensed to Du Pont, none at the time the contract was licensed, the first ones in 1936. None of them were used, none of them were of any consequence, and I am going to come to a discussio. of those nine patents in a moment.

But to say that this was a cross license by two dominant producers who were pooling their patents to build up a pool to exclude others ignores again the facts of the agreement. Sylvania could not make moistureproof without rights under these patents lawfully, and they got rights under the patents on terms and conditions which Du Pont as owner of the patent lawfully imposed.

I suggest to your Honor also that it is hardly accurate to refer to this as a cross license between dominant producers. Is the language of the Supreme Court cases about dominant producers which deal with many established members of an industry coming together in some kind of a pool applicable to a law violator who has no legitimate position in the industry at all and who is em-
barking in violation of law upon the manufacture of a prod-
5661 uct he has not got any right to manufacture? Is he a
dominant producer?

Mr. Minicus. I must object to this line. There is no proof that Sylvania was violating the law at all. Sylvania was before this Court accused of infringing Du Pont's patents which had not as yet been adjudicated. I think these conclusions in the record are insupportable.

Mr. Gesell. Well, I will challenge that statement, your Honor. Mr. Wallach came in to us and said, "We think some of the claims of your patent are no good and we propose to go ahead!'" If this isn't a conscious violator of a patent, an illegal pirating of a patent, I don't know it when I see it.

Let us see what this agreement provided. There was no limit on exports, your Honor, of any kind, as I mentioned this morning, no exchange of technical information, no provisions concerning price, though it is interesting to see that the lawyers advised Du Pont that they could impose price restrictions under these patents, and they didn't do it for business reasons that Mr. Yerkes explained in his letter of not wanting to be tied to any high price stultifying sales policy of Sylvania, and it is extraordinary to me that this charge of price fixing keeps being bruited in this case in the light of the proof now offered that the company was advised there was a lawful means of accomplishing that result and said in its own documents they didn't want that result.

Mr. Minicus. Is Mr. Gesell at this time stating that
5662 it is lawful to fix the price under the patent licensing agreement?

Mr. Gesell. The next thing this agreement does not relate to, your Honor, is that it does not cover any field broader than the basic product patent which was licensed. The licensing of future inventions or improvements is confined to the scope of the basic moistureproof patent.

The Court. Just a minute. That question which was put to Mr. Gesell and he ignored it, rightly so, perhaps, I want to have some information on it. Was Chief Justice Taft's opinion in U. S. versus General Electric overruled that the owner of a patent could not tell the licensee what he should charge?

Mr. Minicus. There is a great deal of doubt on it, I think today at the present time, your Honor——

The Court. I thought the Supreme Court specifically last year refused to overrule it.

Mr. Minicus. No; it did not. The Supreme Court last year refused to rule directly on it and ruled on another point.

The Court. Then where do you get your statement that the law is as you state it to be?

Mr. Minicus. That is the Gypsum case. But there are holdings that we can submit that cast considerable doubt on the General Electric case at the present time.

The Court. All right, go on with your discussion.

5663 Mr. Gesell. I ignored the question because it had nothing to do with what I was saying.

The Court. I understand that, but I wanted to be certain that a recent decision had not come out that I had not heard about.

Mr. Gesell. Now, there was a statement made that this agreement engaged in a clumsy subterfuge in providing that the license should be non-exclusive but that the patents could not be licensed to anyone else without the consent of the licensee. I don't know what the subterfuge is because it is all on the face of the agreement, and we make no claim that this was not an exclusive license in fact. In our view it was an exclusive license in fact, and we say that it makes no difference whether you say a man is licensed exclusively and then when someone else wants a license you go to him and he consents to waiving his rights and you license someone else, or whether you say it is non-exclusive but cannot be licensed without his consent. This was an exclusive license in our view of the matter.

5664 Now I want to direct your Honor's attention to the provisions about the future patents. They, first of all, were limited to the field of the moistureproof patents; and, second, no licensing of future patents was to continue beyond the basic patents unless such future patents were being used. So we have here, your Honor, a one-way license of basic product and process patents on an exclusive basis for royalties, and this agreement has been presented to your Honor throughout the discussion today and yesterday as being analogous to agreements combining competing process patents, and I suggest to your Honor there is a world of difference.

I want to come to the cases in a moment, but just take one, the General Electric case, which was cited this morning. There the basic product patent expired in 1933 and the agreements that Judge Foreman was dealing with were agreements where parties were bringing together whole combinations of competing process patents in an effort to extend the exclusionary right of patents beyond the period. Here, however, we have nothing of that kind. The product and basic process patents were in effect. They were all owned by one party. That party licensed another exclusively as the result of a legitimate law suit. That party accepted no restraints of any kind upon its right to manufacture under its own patents, and it placed no restriction on the right of the other party to manufacture under its patents, and there was no com-
5665 bining or bringing together of competing processes in an effort to make something more from the combination of them than existed in their several parts, whereas here no one could ever make moistureproof cellophane without rights under the patent that Du Pont and Du Pont alone owned; and to hold this agreement bad, your Honor must find that it is wrong to license exclusively or that it is wrong to license at royalties which increase with the production of the licensee. In our judgment no case has ever so held. In fact, there has never been a cross-licensing case—if this be considered a cross-licensing case—which has in-

volved basic product and process patents then in effect which has been held bad for Sherman Act or any other reasons. At the very best, from the government's point of view it must argue by analogy a case of first impression.

Now, I submit that there is nothing wrong about an exclusive license. The Supreme Court has said categorically that an exclusive license does not violate the Sherman Act. In the Bement case and in Virtue v. Creamery Package Mfg. Co. case, and it has repeatedly held in the Paper Bag and the Shoe Machinery case and other cases that the owner of a patent has the right to select his licensee; and as to futures the cases are clear there is nothing wrong in licensing future patents in spite of what was said this morning.

In the Automatic Radio Manufacturing Company against Hazeltine case of 1950 in the Supreme Court there were 5666 agreements in a broad field which involved the licensing and combination of patents for the future for a period of ten years, and the court said that was all right. Certainly the purport and meaning of the Transparent Wrap case is that it is all right to provide for the licensing back of improvements on a basic invention.

Your Honor, the Cracking case which was argued so vigorously here this morning is an authority that it is all right to license future patents, because the lower court there imposed restrictions based in part upon the licensing of future patents. The government argued in the Supreme Court in its brief vigorously that future patent licensing was inappropriate, and the court decided the other way.

We had an effort here this morning to bring this situation within the confines of Judge Rifkind's decision, and I think the discussion showed clearly the difference between this case and the type of case upon which the government relies. Judge Rifkind made much of the point, for example, that the future patents were licensed for a period beyond the life of the existing patents. That is not the case here, because once the basic patents expired no licenses could be granted under any future patents developed after that date, and only those licenses which would have been granted and which were used prior to that time continued. Judge Rifkind also said that the National Lead agreements in- 5667 volved commerce beyond the scope of the patents, and if your Honor will glance at the opinion again you will see Article 14 of the agreement, a bald, flat commercial provision which was shown to be far more all-inclusive and broader in scope than the patents underlying it. There is nothing of that kind here.

Then there was talk of the Carboloy case and its reference to the scale of the licensing. Well, this licensing, your Honor, was limited to a specific product covered by a product patent—not to an industry, not to a field.

There was talk about a greater obligation on a dominant company. Well, does that mean that a company which is large cannot license for a royalty, can't license exclusively? It seems to me clear that there is no holding anywhere which would strike down a contract of this kind.

Now we have to deal with the patents which were licensed back, and it is those patents on which apparently the government places its principal reliance. There was reference in the argument to the fact that this agreement brought within Du Pont's sphere of influence important patents of Sylvania. Well, I say that just isn't so. I point out to the Court at the beginning that Sylvania was free to operate its own patents as it chose, and if these had been such important and significant patents there was no limitation upon its right to manufacture under them. What were they?

5668 They were nine in number. Five of them were licensed in 1936, two in 1939, one in 1941, and one in 1942. Six of them in all related to moistureproofing coating compositions. One was a heat-sealing patent, and two related to a process for applying the coating, a process which was not used by either Du Pont or Sylvania. None of these patents was ever used by DuPont. There is no evidence that they were ever used by Sylvania; and, if your Honor please, none of them could have been practiced without rights under Du Pont's basic moistureproof patents. No one could operate a process for coating without rights under those patents, and certainly no one could coat with some minor wrinkle of a composition that came along. So that there wasn't because of these nine patents any expansion or extension of Du Pont's monopoly position so-called, and isn't that, your Honor, the inquiry that should be directed to this agreement? Did this agreement in some way enhance Du Pont's position? Certainly it did not enhance its position when it let in a new competitor, and I say it did not enhance its position because during the course of its life at various times nine patents which were never used and were of no significance came to it under the licensing provisions governing improvements from Sylvania.

We have heard a great deal about the extra royalty provision, but I know nothing in the cases which says that an extra royalty provision is illegal or improper, and I can't see how it enhanced

5669 Du Pont's monopoly position if as now seems to be generally conceded in the case Sylvania was never able to sell a sufficient amount of cellophane for the royalty provision even to become operative, and if Sylvania was always free at any time to go out and do anything it wanted in the way of manufacturing and selling products made under its own patents. At no time through this agreement or otherwise was it prevented from utilizing its own inventions for the manufacture of as much cellophane as it wanted to make.

Now the question comes down, it seems to me, to whether it restricted third parties, which is the other contention advanced. Well, how did it restrict third parties? If you let one person manufacture under an exclusive license is that more restrictive than if you choose not to license anybody? It seems to be not. If we could by asserting our patent exclude anyone from manufacturing this article, why do we restrict others if we make an agreement to license one person exclusively? I have said once and I will say again, Where is the evidence that anybody came knocking at the door and said "We want to manufacture moistureproof cellophane" and was denied a license? The best that Mr. Minicus could show on his argument in answer to that point, which I mentioned several times, is that there were people who wanted to make cellophane moistureproof. Well, I ask your Honor to watch carefully the language. There were some people in the war time in particular who wanted rights to buy plain cellophane from us and coat it in one way or another, and not all of
5670 them got licenses, though many did. But is that a situation——

Mr. MINICUS. I ask that that statement be stricken from the record. There is no evidence of it at this time, your Honor.

Mr. GESELL. There is no evidence, your Honor, where anybody came in to these people and asked for a license to manufacture moistureproof cellophane.

Mr. MINICUS. There isn't at this time, your Honor.

The COURT. Let Mr. Gesell finish.

(Mr. Gesell's last statement was read to the Court by the Reporter.)

Mr. MINICUS. I think Mr. Gesell is trying to comment now on evidence that we have that we have not put into the case yet. Of course it is not in yet because we haven't put it in yet. We gave our analysis to this point, which is within the four corners of the agreement, your Honor, and he has gone way off into the operation of this thing, and I don't think it is right to permit him to put statements categorizing our evidence into the record at this time when the evidence has not come in yet.

Mr. GESELL. We have been coming to the evidence of these things, your Honor, since the day the case opened, and it looks like we are never going to come to it, because every time one of these issues comes up they say the evidence is not in yet, we 5671 will come to it. I say there isn't any and there never will be. There isn't any evidence that anybody asked for a license to manufacture moistureproof cellophane and was refused it; and we had the charge constantly presented to us yesterday that the result of this agreement was to restrict third paries.

The COURT. I think that is fair comment, Mr. Gesell. That is within the purview of the evidence that was brought out yesterday.

5672 Mr. MINICUS. May I ask your Honor if it is also a fair comment, Mr. Gesell's statement that there will not be such evidence in this record?

The COURT. Well, that is his statement. I do not give any particular weight to that. But you brought in the matter of the function of the agreement being to exclude third parties. I think it only fair that Mr. Gesell be able to comment on that situation, to wit, third parties, their exclusion or non-exclusion.

Mr. GESELL. We had a great deal of discussion yesterday, your Honor will recall, about all the rayon companies that were drifting around that might make cellophane.

Now, if your Honor pleases, we have some specific provisions here which I think we ought to take up. I will not refer to the quarterly reports because apparently their vice is going to come at some later stage in the case. We are going to have a very busy last day of this case, your Honor, if this keeps up.

Now, we have here a criticism of the fact that the agreement says that we said that Sylvania could not sue infringers of Du Pont's patents and that therefore we restricted Sylvania and the only right Sylvania had was to cancel the agreement if somebody infringed. Well, for the life of me I cannot see how that was a bad thing for us to retain to ourselves the right to sue in- 5673 fringers of our own patent. And when was it that a licensee who had the power to terminate if the infringement existed was given the right also to sue infringers? I just don't understand it.

We also are criticized for a provision which it is admitted is common in agreements of this kind requiring an acknowledgment of validity on the part of Sylvania.

Then reference was made to a lot of cases where the Courts had been critical in recent years of that provision in situations where members of an industry suddenly come together, having operated independently, and put all their patents into the pool, subject to mutual covenants not to challenge validity. Well, I can see public policy issues as to that, but I don't see any public policy issue, if that is what we are litigating in this case, for saying to a man who has illegally infringed your patent, that when he settles the suit one of the conditions must be that he acknowledges the validity of it.

Mr. Minicus. I presume I have a standing objection, your Honor, to Mr. Gesell's statement every time he mentions that Sylvania was illegally infringing Du Pont's patent. That was never determined. Mr. Gesell's statement before that Mr. Wallach said that he did not think Du Pont's patent was valid and therefore was going to operate under it is not an admission of an illegal act.

The Court. The patent having issued from the Patent Office and there having been no jural declaration of invalidity,
5674 I think Mr. Gesell has a basis to say his patents are valid.

Mr. Gesell. And the Government not attacking it in this case, your Honor, and the patent expired.

Every time we come up against this patent and I refer to its validity and the legal rights that the owner of a valid patent has, an effort is made to say, "Well, it isn't valid," or "There is no proof that it was valid." And that is the one issue we have settled in this case. And it is the only way they can dodge the applicable law and facts, to say that this was an invalid patent. And they have not come forward with the proof—they have not got the proof. They issued the patent themselves.

We were also criticized, your Honor, for holding back trade secrets. Well, I don't understand that one either. I am sure that if know-how had been licensed under this agreement, we would have heard even more about pooling of technology, and I can't see what was wrong in only licensing these people under the patents and not giving them the results of our research. When is it that the law says that a man who has spent millions of dollars on research has to give that to a competitor because the competitor chooses to pirate the patent and infringe it? I know no such law.

As to whether this is usual or unusual in licenses of this kind, I have seen them both ways. My own information would be
5675 that it was more usual not to include it than to include it.

So we come down, it seems to me, in the discussion of this agreement to two considerations: One, your Honor must decide whether or not it in any way enhanced Du Pont's monopoly position. And we say it didn't. Then your Honor must determine whether or not this agreement was a valid agreement. And on that issue the Government tenders a group of cases which we feel are not in point, quite apart from the fact that almost all of them—all but one, I believe—were cases that came down after the agreement was entered into.

Our basis for distinguishing those cases is a very simple one. Each of these Sherman Act cases must be looked at on its facts, and we say the Government cannot point to any case condemning cross license agreements—if your Honor finds that that is what this was, though we don't think it was—except in cases where competing product or process patents were brought together for the purpose and with the view to expanding the field of the domination of the two licensors beyond the field which they had as a result of being owners of individual patents.

As the Cracking case said at page 175, and as all the subsequent cases that follow it have said, the condemnation is directed against the pooling of competing processes. And here, unlike any of those cases, there existed a valid broad product patent in effect for the entire life of the agreement, and no licensing backed by Sylvania of minor improvements in 5676 any way broadened the right to exclude which Du Pont had under the laws of this country as the owner of a valid product patent. There were simply no competing patents of any kind at the time this agreement was made, and none of the minor patents of Sylvania that came back could have been premised without rights under Du Pont's basic product patent.

May I have a moment, your Honor?

The COURT. Yes, sir.

Mr. GESELL. That is all, your Honor.

The COURT. We will recess until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m. of this same day.)

5677 2:15 O'CLOCK, P. M., THE SAME DAY.

Present: As before noted.

Mr. MINICUS. Before passing to the next subject in our evidence I would like to consider the accuracy of some of the evaluation made this morning of our evidence previously offered.

The COURT. I have had enough of Government's Exhibit 2487 as far as discussion is concerned. Anything further you have to say you can put in final argument. I think we ought to get along.

Mr. MINICUS. Yes, your Honor.

The COURT. Unless you think it will in some way curtail your method of proof. You have both pointed out to me what you consider to be the caveats in that agreement and I think I have the points fully in mind. You have pointed out, it seems to me, very ably on both sides, the difficulties I have. You can well imagine why I don't want to hear any more about it.

Mr. MINICUS. We turn now, your Honor, to certain evidence which we contend illustrates the intentions of the parties, particularly the Du Pont Company, with regard to the agreement and its amendments which we have just been considering.

5678 The statement appears in the government's trial brief at Paragraphs 102 through 106 that the understanding between Du Pont and Sylvania is implemented by the agreement of April 26, 1933 and its amendments are motivated by a three-fold purpose: These were restriction upon the production and sales by the only other manufacturer; two, the creation of a closed patent pool designed to exclude from the industry all but the two existing manufacturers; and, three, implementation and perpetuation of the exclusive pooling arrangement by pre-arranged cross-licensing of all future patents.

The exhibits about to be introduced disclose the mental processes of the participants in the understanding as they occurred relative to and co-temporaneous with the execution of the agreements or the licenses. They are conclusive upon the fact that Du Pont intended to create a closed patent pool through the combination of an all-inclusive cross-licensing arrangement with restrictions upon the rights of the individual patentees to grant licenses under their own patents to persons outside the relationship. In other words, Du Pont and Sylvania representing 100% of the productive units in the industry combined their separate patents, both present and future, with the intention that none of these patents should become available to potential competitors or others.

The first exhibits which I desire to offer in evidence are
concerned with interpretive material co-temporaneous
5679 with execution of the agreement of April 26, 1933.

* * * * *

5681 Mr. Gesell. Well, I object to leaving the document without reading the next paragraph.

Mr. Minicus. I think Mr. Gesell may read the next paragraph when he answers my comments on these, your Honor.

The Government offers in evidence Government Exhibit 2491 appearing at page 3246. This is an unsigned memorandum of the Du Pont Company dated January, 1933. There is a leading at the top. "File—Sylvania Suit."

(Unsigned memorandum of Du Pont Company dated January, 1933, with the heading at the top "File—Sylvania Suit," was received in evidence and marked "Government's Exhibit No. 2491.")

Mr. Minicus. It reads:

"It is not clear to me the basis of the desire to settle before trial our proposed case against Sylvania.

1. Is it because of lack of faith in our ability to establish the patents? Or

2. Is it because we feel that our specific method of moisture proofing is but one of several that will be discovered during the next few years? Or

3. Is it because of the desire to minimize competition by restricting the number of manufacturers, a situation likely to ensue if a cross licensing is made between Sylvania and ourselves?

"If No. 1, isn't it better to make any settlement 5682 that will involve payment to us without even attempting to restrict his output? We then collect for something we cannot hope to collect if the proposition comes to a legal issue?

"If No. 2, we have but a brief time to enjoy what we have, so why not collect anything we can before the new nearby development is realized?

"If No. 3 would have the suggested result, isn't it to our interest to accept almost anything they suggest so that the monopoly could be confined to two of us?"

Now, in that document, your Honor, I submit that we have the basic question raised in this entire issue as far as the restrictions upon others are concerned. Three questions are presented here for resolution concerning Du Pont's purposes in entering into this agreement.

Mr. Gesell. May I inquire who the Government contends wrote this document?

Mr. Minicus. The Government contends that Mr. May wrote this document.

Mr. Gesell. That is correct.

Mr. Minicus. Thank you, sir.

The Government offers in evidence Government Exhibit 2492 at page 3247. This is a memorandum dated February 15, 1933, bearing initials at the bottom, L. A. Y.

(Memorandum dated February 15, 1933, bearing initials L. A. Y., was received in evidence and marked Govern-5683 ment's Exhibit No. 2492.")

Mr. Minicus. This, your Honor, is another very important document in our opinion.

"There are apparently three ways of settling Paragraph #8.

"First—to confine the agreement to the present issued patents of both parties and to have any future issued patents subject to negotiation in each particular case.

"Second—to have the agreement cover broadly all present issued patents and applications and all future patents for the life of the agreement freely interchanged between the two parties without any further fee or strings of any kind.

"Third—to have future patents issued to either party available to the other party at a fixed fee, the suggestion being made by Dr. Wallach of 2%.

"Variations could of course be applied to any one of these three, but that would probably only add to the complications.

"It seems to us that the original suggestion of ours is still the most logical and best guess as to what future conditions may bring to both parties of the contract—namely, to have future patents issued to either one of the contracting parties available to the other without any additional fees, but confined to the coating of regenerated cellulose.

"The argument for this it seems to me is rather good. 5684 Our present method of manufacture and the article which we are discussing is a coated regenerated cellulose, and this is the article which in all probability will be sold by both of us during the period of this agreement. This is also the article on which we propose to present a united front in an endeavor to keep other people from manufacturing it. Therefore any improvements, changes, patents, etc., as applied to regenerated cellulose coating, should be thrown into the pot for mutual protection during the life of this agreement."

Included in that part, your Honor, is the patent upon which the defendant places such great reliance for justification of its monopoly position in moistureproof.

Mr. Gesell. Well now, just a minute. This was not done at all, your Honor. The suggestion that Mr. Yerkes made was not the suggestion adopted in the agreement.

Mr. Minicus. We have seen the agreement, your Honor, and we have seen Mr. Yerkes' statement here. We can put them in juxtaposition and see where we come out in the end.

Continue reading:

"By the same reasoning, anything outside the present scope of our agreement, as for example uncoated regenerated cellulose or other forms of cellulose, which either party may patent and which may be of great value, that value we should not attempt at this time to set, as it is perfectly clear I think that whatever 5685 values we attempt to place will be unsatisfactory to either one or the other. It seems impossible even to attempt to set any fee or value on an unknown future patent."

There Mr. Yerkes was talking about things other than moistureproof cellophane. I think that point will gain significance as the proof is adduced.

"If a completely new and marvelous discovery should be made by either one of us during the life of this agreement, a 2% royalty might be and probably would be ridiculous, so that one party or the other would not feel satisfied.

"It is clear that we are trying to cover an absolutely unknown future situation. It seems to us this is always dangerous and should be left to be taken care of at the time.

"We therefore believe that the best solution of this problem is to interchange all patents during the life of the contract as applied to coated regenerated cellulose freely; any patents outside of the above to be subject to special negotiation, and in case of disagreement to arbitration."

Now, the patents that they are talking about in that last paragraph, your Honor, are patents outside of the field of coated regenerated cellulose. So something else is coming into this correspondence now than moistureproof cellophane.

5686 We submit that this exhibit, then, obviously supplies the answer to the inquiry of Government Exhibit No. 2491, the previous exhibit. Can there be any question that the basis for Du Pont's desire to settle the Sylvania case before trial was in large degree the objective minimizing competition by restricting the number of manufacturers so that the monopoly can be confined to the two producers?

This document, your Honor, was written by the same gentleman who, in an exhibit, as Mr. Gesell has pointed out previously, 17 years ago sought a monopoly of the bands business by patent acquisition. The Court's particular attention is invited to this period 17 years ago when Sylvania was getting started and Celon was branching out into the caps and bands business. It was in the period from 1930 to 1935 when the exercise of all these practices was going on in order to re-align the monopoly which theretofore had been unchallenged, and the realignment accomplished at that time has persisted in monopoly form down to the filing of the complaint.

The government offers in evidence Government Exhibit 2493 at page 3249. This is a report from Mr. Hess to Messrs. Hatt, Albright, duPont Lee, and Mudge, dated May 4, 1933. The heading is "Settlement of our Moistureproof Cellophane Patent Suit against Sylvania Industrial Corporation, Involving License to them, and Provision for Cross Licenses under the New Patents."

Mr. Gesell. No.

Mr. Minicus. "Under any new patents."

5687 (The report from Mr. Hess to Messrs. Hatt, Albright, duPont Lee and Mudge dated May 4, 1933, was received in evidence and marked "Government Exhibit No. 2493.")

Mr. Minicus. In the heading of this correspondence they certainly refer to this agreement as cross-licensing agreement.

(Reading.) "There is quoted below letter, dated April 26, 1933, from L. A. Yerkes, President, to the Sylvania Industrial Corporation, 122 East 42nd Street, New York, N. Y., viz:

"This letter will confirm our oral understanding that the suit now pending in the Delaware Federal Court against Sylvania Industrial Corporation, and the suit now pending in the Federal Court at Richmond against Sylvania Industrial Corporation, for infringement of the five patents 1,737,187, 1,826,696, 1,826,697, 1,826,698, and 1,826,699, will be dismissed by plaintiff as soon as possible after the signing of the contract recently negotiated between us in settlement of said infringement.'

"The agreement referred to was executed in duplicate by both parties under date of April 26, 1933, and the original executed copy is handed you herewith for the Secretary's File. An extra working copy each for Mr. Albright and Mr. Lee is also enclosed. Kindly acknowledge receipt on attached extra copy of this letter. It is intended that this agreement be kept as con-
5688 fidential as possible, and the contents of it not be discussed
with any one not having any interest in complying with our part of the agreement."

Then follows a description in summary form of the agreement as just read, which I shall not read at this time.

If your Honor please, bearing in mind that the parties participating in this arrangement were not merely dominant, but represented the totality of the producers in the industry, in the light of these documents there is no room for doubt that the individual monopolies granted by the patent statutes were intended to be used unitedly to restrain competition. The government will establish that the intent shown to have existed at the execution of the cross-licensing agreement of April 26, 1933, persisted down to the date of filing the complaint.

I am about to introduce four documents which contain material pertinent to the amendatory agreement of July 12, 1938. We believe that the following documents will show for one year prior to the amendatory agreement Mr. Gregg of the du Pont Legal Department pointed out the objectionable nature of the mutual consent clause and that at that time no action was taken on his recommendation, but action was taken the following year.

The government offers in evidence Government Exhibit 2496 at page 3253. This is a letter from Mr. Gregg to F. G. Hess dated July 22, 1937.

(The letter from Mr. Gregg to Mr. Hess dated July
5689 22, 1937, was received in evidence and marked, "Government Exhibit No. 2496.")

Mr. MINICUS. [Reading.]

"Referring to our conference a few days ago, relative to the provisions of Paragraph 17"—and there is a pencil note to that—"provides for approval of either party before other party can grant license to a third party"—continuing with the letter—"Paragraph 17 of the agreement dated April 26, 1933, between Du Pont Cellophane Company, Inc. and Sylvania Industrial Corporation, I attach hereto a draft of suggested form of amendment of that paragraph. You will note that I have endeavored not to change any of the language of the paragraph except in so far as I consider amendment essential."

Then there is a handwritten notation at the bottom of the page:

"This proposed revision was suggested by Mr. Gregg while we were considering a separate cross-license agreement with Sylvania under U. S. Patents Nos. 2,013,860 (of Sylvania) and 2,062,179 (of duPont) re. Ultra Light Violet Light Protective Film. Mr. Gregg objected to Article 6 which provides for mutual approval before granting licenses to third parties."

Now, attached on the second page of Government Exhibit 2496 is Mr. Gregg's proposed amendment to the mutual consent clause.

It will be noted that this amendment, which I will not read,
5690 proposes a seemingly innocuous favored nation clause in-
stead of the mutual consent clause. I draw the Court's particular attention to that fact, that what is being used here—because this will become of importance later—what is being used here to replace the mutual consent clause is rather the common form of favored nation clause.

5691 Mr. MINICUS. The Government offers in evidence Government Exhibit 2495 at page 3252. This is a letter from Mr. B. M. May, Assistant General Manager, to Mr. W. S. Gregg, dated August 27, 1937, about a month after the previous exhibit.

(Letter from Mr. B. M. May to Mr. W. S. Gregg dated August 27, 1937, was received in evidence and marked "Government's Exhibit No. 2495.")

Mr. MINICUS. It reads:

"Fred Hess has turned over to me your letter of July 22nd in which you recommend that the agreement of April 26, 1933 between Du Pont Cellophane Co. Inc. and Sylvania Industrial Corporation be revised in respect to Paragraph 17 thereof.

"From a business point of view there are many reasons why it would be undesirable for us to bring up with Sylvania the question of a revision of this contract, in that there are several points which we know they will press to have revised and under which we do not care to make any concessions.

"Unless it is the insistent opinion from a legal point of view that this contract be revised, we prefer to have it remain as it is."

There is another handwritten note at the bottom of this exhibit dated 9/9/37—B. M. M. said Gregg phoned him that if above was the way we felt, he would not insist upon revising Article 17.

So we have it that after considering the questionable
5692 aspects of the mutual consent clause both the Management
and the Legal Department demurred to a change.

Now we shall see that a year later licenses under 4/26/33 were changed to exclusive grants.

The Government offers in evidence Government Exhibit 2489 at page 3242. I will not read the exhibit. It is a description of the amendatory agreement which was previously read into evidence.

(Memorandum from B. M. May to Executive Committee dated July 19, 1938, was received in evidence and marked "Government's Exhibit No. 2489.")

Mr. Minicus. The Government also offers in evidence Government Exhibit 2490 at page 3243, which is a letter from Mr. May to W. F. Raskob, Secretary, and I will not read that. This again describes the amendatory agreements and other agreements in considerable detail.

(Letter from Mr. May to Mr. Raskob dated October 11, 1938, was received in evidence and marked "Government's Exhibit No. 2490.")

Mr. Gesell. Your Honor, what is the relevancy of that? We have the amendment in. Why do we need these formal letters that he is not even reading, that he does not see any significance in?

Mr. Minicus. I did not say I did not see any significance in them.

5693 Mr. Gesell. I would like to know what the significance is, if they have some significance. This is the kind of surplusage that we are coming to more and more.

Mr. Minicus. I doubt that; there has been very little surplusage, and in this case, your Honor, this is not surplusage.

The Court. What is the purpose of the proffer?

Mr. Minicus. There are facts in this letter—if Mr. Gesell would prefer to have me read it I will gladly read it—

Mr. Gesell. I simply want to know what issue it is directed to so that I can meet it. I don't want him to read it—

Mr. Minicus. Then I don't understand his objection if he doesn't care——

The Court. Why not tell him the purpose?

Mr. Minicus. It is simply to explain the intention of the parties at the time they signed the amendatory agreement.

The Court. Now, Mr. Gesell, he has stated the purpose.

Mr. Gesell. It is just a letter of transmittal to the Executive Committee. I suppose I have had this out with your Honor. There is nothing I can do about it. We are going to have pages of this kind of stuff as we come along, letters of transmittal that don't add anything to the probative value of the material. The amendment is in.

Mr. Minicus. This is not a letter of transmittal. This is a
three-page letter of description and, furthermore, there is
5694 another matter on the last page of this agreement that we
intend to refer at a later point involving another licensing

agreement between Du Pont and Sylvania. There will be a great many of these licensing and cross licensing agreements between Du Pont and Sylvania from now on. This is not the only one.

The Court. But I think it only fair to the Court to heed Mr. Gesell's warning that if there is surplusage there, such as a formal transmittal of a writing to the Executive Committee, that I should not be bothered with that.

Mr. Minicus. I think I can assure your Honor that we have taken every formal letter of transmittal out of this record.

Mr. Gesell. Well, what is there in Exhibit 2489 that puts us forward an inch, or a centimeter? I don't know whether your Honor has that before you.

Mr. Minicus. Does your Honor have a question for me with regard to this?

The Court. I asked you to state your purpose. You stated it was to show the intention of the parties as to why they entered into the license agreement.

Mr. Minicus. Yes, sir.

The Court. Now, Mr. Gesell says he challenges that, that there is not any purpose stated in the letter. In short, we are taking this as a typical example of our discussion. What is there in the letter——

5695 Mr. Gesell. To show the intent.

The Court. To show the intent to enter into the agreement or some specific agreement or some reason other than the fact——

Mr. Minicus. In the first place, there is descriptive matter in here, your Honor, concerning another agreement that is to come along at a later date. It was incorporated at this time because there is also descriptive matter in here explaining certain things with regard to the amendatory agreement. We want it in evidence for both purposes. We will refer back to it when we come to the other agreement. I can well understand Mr. Gesell not liking this evidence.

Mr. Gesell. There is nothing in this except a letter of transmittal, your Honor.

Mr. Minicus. All right, we will see if it is a letter of transmittal. The Government will read from Government Exhibit 2489——

The Court. Just a minute. I do not know whether you are going to read it all or not—that is, I do not know whether I will listen to it all. Can you just point out what paragraph you are going to rely on? You do not have to discuss it at this time if you do not care to, Mr. Minicus, because you should be permitted to prove your own case in your own fashion. But for the purposes of my passing on the matter that is before me at the

moment, direct my attention to the paragraph you have
5696 referred to so that I can make some disposition of the objection that Mr. Gesell has.

Mr. MINICUS. I don't understand the grounds of the objection, your Honor. Is it irrelevancy, is it immateriality, or what?

The COURT. Well, I suppose it would be either one or both of those grounds, but he wants to know the purpose. Now you come back and say, intention. It seems to me that we are all approaching it in a conceptuistic way. I do not like those loose words such as "intention." What is the evidence that you are relying on in that letter? Just point out the paragraph to me, then we can pass on.

Mr. MINICUS. Do you have 2489 before you?

The COURT. Yes, sir.

Mr. MINICUS. The last three paragraphs on the page.

The COURT. Well, if that is all, we will pass on. You may note, Mr. Gesell, that as far as 2489 is concerned, the Government is relying on the last three paragraphs which it says will have a more acute pertinency at another time than at the present.

Mr. MINICUS. The documents about to be introduced in evidence, your Honor——

The COURT. My last two are 2489 and 2490, is that correct?

Mr. MINICUS. That is correct, sir.

5697 We come now to a new group indicating specification of certain exclusionary effects of this agreement as amended which persisted after the amendatory agreement. The first group was a set of documents co-temporaneous with the basic agreement. Then we moved on to the amendatory agreement, showed what happened there, and finally we come now to certain exclusionary practices which persisted after the amendatory agreement showing that the amendatory agreement changed nothing at all.

It is true that whereas at the request of the Du Pont Legal Department certain of the objectionable clauses of the agreement of April 26, 1933, were cured on the face of the contract by the amendatory agreement of 1938, that their operative effects persisted and remained identical, that the changes were merely a form and altered nothing of substance, and that will be established by the exhibits immediately to follow.

We shall incontestably establish that mutual consent by Du Pont and Sylvania remained a prerequisite to licensing third parties under the individual patents of either party. Further, that the conditions attendant upon such mutual consent rendered it extremely unlikely that any new competition would ever develop within the scope of the agreement.

The Government offers in evidence Government Exhibit 2509 appearing at page 3276. This is a letter from W. W. Mills of the duPont Company dated April 23, 1943.

(Memorandum from W. W. Mills entitled "Moisture-
5698 proof Adhesive Compositions and Adhesives Therefor"
dated April 23, 1943, was received in evidence and marked "Government's Exhibit No. 2509.")

Mr. Minicus. We think that the question raised by this exhibit is whether duPont's customers had a right to purchase plain cellophane and then apply thereto moistureproof adhesives, and we believe that it is determined herein that plain cellophane would not be sold by the duPont Company for that purpose, and, furthermore, we believe it is emphasized that the reason for this did not in duPont's mind rest upon its right to exclude under patents but rather that duPont was so bound by its relationship with Sylvania that regardless of any wishes it might have had in the matter is was perilous to grant rights to customers under its patents for moistureproof adhesives in conjunction with cellophane. In other words, that from here on, it is the agreement that controls whether people get the right and not the patent.

This Exhibit 2509 reads:

"Moistureproof Adhesive Compositions and Adhesives Therefor.

"For a great many years, we sold cellophane which was moistureproofed by a relatively thin coating on both surfaces and were constantly confronted with the necessity for glassclear transparency and good slip. As the war came on, there was an
insistent demand for wrapping material and packages
5699 which were moistureproofed to a far greater degree and
in which there was very little interest in transparency. Moreover, since many times these films would be used for sandwiches, there was no objection to and there was interest in a rather high degree of stickiness. Our Research people, being free from the limitations of transparency and good slip, thought that they had a great many compositions in notebooks which would yield interesting compositions quite quickly.

"The Dearborn Wrapper

"Before these compositions were brought out and exploited, the trade became conscious of an excellent wrapper made by the Dearborn Chemical Company. It consisted of a sheet of acetate film laminated to a sheet of cotton scrim by some sort of a moistureproof adhesive and over-coated with the same.

"While we do not know the composition of the adhesive used by Dearborn, it is believed to be amorphous wax and a resin

This seems likely in view of their U. S. patents Nos. 2,291,838 and 2,311,572. These patents describe a coating composition of a mixture of petroleum waxes which may contain additionally paraffin and rosin. The coating composition is described as highly resistant to moisture, possessing good dielectric qualities and good adhesiveness.

"On the assumption that Dearborn might go to a lamination of regenerated cellulose film to scrim, we became concerned
5700 about the effect on the Sylvania agreement. Mr. Daley, in his Opinion of October 22, 1942, concluded that there would be no breach of the agreement if we were to sell Dearborn viscose film for their purpose.

"(The Dobeckmun 'Tritect' bag is to be discouraged and stopped since it does involve the Sylvania agreement.)"

The Government offers in evidence Government Exhibit 2510, at page 3279. This is a letter from S. M. Prall to Mr. C. E. Brown dated May 11, 1943.

(Letter from Mr. Prall to Mr. Brown dated May 11, 1943, was received in evidence and marked "Government's Exhibit No. 2510.")

Mr. Minicus. I will only read the first three paragraphs: It is under the heading "Moistureproof Adhesive Compositions and Adhesives Therefor."

"The Memorandum of April 23, 1943, by Dr. Mills, which was written to reflect my views, needs to be corrected in certain portions in view of our discussion of May 7 as follows.

"You indicated that for reasons of heat-sealability, Dearborn might wish to use a moistureproofed regenerated cellulose film. In that case, the Sylvania agreement would certainly not be involved.

"You said that the Dobeckmun 'Tritect' bag is definitely made by laminating two or more sheets of moistureproof cellophane with a moistureproof adhesive. It follows, therefore, that the Sylvania agreement is not involved."

5701 I think those two documents, your Honor, show quite clearly that when it begins to appear that some other person in their activities is coming close to the field of this agreement, what duPont is primarily interested in is the effect upon the Sylvania agreement and not the effect upon the patents.

5702 The government offers in evidence Government Exhibit No. 2511, page 3281. This may be a little bit illegible and for the purpose of reading here where it is rather difficult I had a typed copy made.

This is a letter from Mr. Charles F. Daley, patent attorney of the du Pont Company to Mr. R. L. Richards dated July 14, 1944.

(The letter from Charles F. Daley to Mr. R. L. Richards dated July 14, 1944, was received in evidence and marked "Government Exhibit No. 2511.")

Mr. Minicus: (Reading.)

"Re:-Cellulosic Tubing To Be Used in the Packaging of Grease Products

"I understand that Shellmar has made some progress in developing cellulose tubing for use in the packaging of grease products, their proposed method of making the article including the drying of gel tubing, followed by dipping of the end of the tubing in a nitrocellulose-wax solution of such a character that, when dry, it will yield a heat fusible coating to assist in efficient closing, under the influence of heat, of the end of the tubing while dispensing with the use of a metal strip. The tubing, according to the present plan, will not be moistureproof since it will be only partially coated.

"The dispensing end of the tube will be provided with the usual aperture head or nozzle.

"The question to be settled is whether this 5703 proposed manufacture by Shellmar, perhaps in conjunction with its customers, will conflict with our commitments in the du Pont-Sylvania agreement relating to moistureproof film.

"In my memorandum of November 23, 1943, a somewhat analogous situation was discussed although at that time, we were concerned with a tubing which was to be completely coated with a moistureproofing composition. In that memorandum, I stated that the better position to take was that the Sylvania agreement did not contemplate, as exclusively licensed to Sylvania, the manufacture of such moistureproofed tubings although the question was not entirely free from doubt. In the present situation however, since the tube as a finished article is not a moistureproofed product, there appears to be no conflict with the Sylvania agreement. At such time as Shellmar contemplates making a completely coated tube which will be moistureproof, we will then have the situation discussed in my memorandum of November 23, 1943 and should at that time decide whether we wish to contact Sylvania or, on the contrary, adopt the better position that we are free to go ahead. Even though a tube is made by coating over the whole surface of the tube, inside or outside, if the tube does not show moistureproofness according to a reasonable test and within the definition of the Charch and Prindle patent, there will not be any conflict with our Sylvania commitment.

"Apart from the matter of conflict with rights already 5704 granted Sylvania as I pointed out in my memorandum of November 23, 1943, there is a possibility of being unable to enforce some of our patents directed to film coated with a moistureproofing composition if the customer uses the unpatented composition in the making of the patented article although even in that situation, we should be able to enforce such a patent within Sylvania's licensed field. If the composition is itself patented, our sale of the composition is an exercise of the patent right by us and would not be a waiver of a right of action under the patent if the composition is bought from another source without du Pont's permission. In this connection, I understand from you that the coating may be anchored to the tubing by a composition which is covered in one of our Lanning patents and that this composition will be sold by the F. & F. Department. The sale by du Pont of the composition would not affect its right to enforce the patent against infringers. With regard to your question as to whether we should notify the customer that the composition sold comes under the specific Lanning patent this is not essential although it is advisable to give such notice either by letter or by so labelling the composition that is sold. If you do not wish to label the package with the patent number, you may give the notice by a paragraph such as the following:"

I will not read the remainder of the letter.

Here again where the question arose what du Pont's relationship should be with Sylvania, a very important customer, for the purpose of producing cellulose tubing for grease products it is determined that in the event such tubing should be moistureproof complications will arise out of the Sylvania agreement. 5705

The government offers in evidence Government Exhibit No. 2499 at page 3265. This is a letter from Mr. F. M. Prall to Mr. J. E. Hatt dated February 9, 1942.

(The letter from F. M. Prall to J. E. Hatt dated February 9, 1942, was received in evidence and marked, "Government Exhibit No. 2499.")

Mr. Minicus. (Reading.)

"In the course of the general policy discussion on moistureproof laminated products confirmed in a letter of February 6, 1942, Mr. Hines specifically discussed a letter from the Interstate Folding Box Company and said that they wanted us to sell them P. T. film and that they intended to laminate it together using their own laminating compositions which are moistureproof. Mr. Hines pointed out that in this situation there was no question of their asking for 'know-how' or skill from us. He also pointed out that in order for us to do this we might need to get the consent of Sylvania.

"It was decided that Mr. Hines would refuse to sell the viscose film to the Interstate Folding Box Company for this purpose and

to say to them that we will provide them with their requirements of moistureproof or moistureproof laminated film.
5706 Mr. Hines, I believe, said that he wanted to more critically read the letter from the Interstate Folding Box Company in view of this discussion."

Here I believe we have a situation in order for du Pont to sell plain cellophane to the Interstate Folding Box Company, a customer, and the latter intended to laminate that plain cellophane using its own moistureproofing composition for the laminations, here again is an admission it would be necessary for du Pont to obtain the consent of Sylvania in order to permit its customer to do that.

Mr. GESELL. So that I may sharpen this, your Honor, may I inquire whether Mr. Minicus' contention is that the contract did not require that? Because it is our view that in view of the exclusive license of course the question of commitment to Sylvania came up, because they were exclusively licensed after that amendment on moistureproof cellophane. I don't get the point of these documents. Is he suggesting there is some commitment not in the contract or is he suggesting it is just carrying out the contract? If it is the latter we never disputed that we carried out the contract.

The COURT. What is your view, Mr. Minicus?

Mr. MINICUS. We regard there is no doubt that it is the contract; that is exactly the point we are making here; that every time somebody came along and there was any question about moistureproofing cellophane the thing that du Pont
5707 looked to was not its patent position, but what the effect would be on the contract with Sylvania. In other words, the measure of this whole thing about whether a person can use moistureproof cellophane has ceased to be this great product patent and has now become this contract with the Sylvania Corporation. Furthermore, in this case these have all been customers buying plain cellophane from the du Pont Company, and they have different things that they want to do with it. The important thing they want to do is perhaps not the moistureproofing, but in one case they want to put it together with some cloth and they want to put two pieces together and they want to put it to paper, and the adhesive just happens to be moistureproof. So they bought their cellophane from Sylvania, and now they find they can't use it for the purpose for which they need it. I ask the Court if du Pont's own customers could not get a license to do these things because of the Sylvania agreement, what chances did anybody ever have that wanted to manufacture and sell cellophane of getting a license?

Mr. Gesell. The point is that the patent in question was licensed exclusively to Sylvania, and therefore we could not see others infringe the patent without taking up—

Mr. Minicus. That is exactly what the government maintains.

Mr. Gesell. It is a very simple fact. We could not license someone to make a moistureproof cellophane by coating 5708 a plain cellophane without consulting Sylvania if they had the exclusive license. There is no mystery about this and there is no dispute about it. As long as it is clear that that is the contract commitment that is operating, that is all there is to it.

The Court. I have it.

Mr. Minicus. I think these documents certainly do show that there were some people that had some interest in using cellophane in a manner that would moistureproof it. These people outside the du Pont and Sylvania relationship were interested in moistureproofing cellophane.

The government offers in evidence Government Exhibit 2497 at page 3255; Government Exhibit 2498 at page 3258; Government Exhibit 2500 at page 3266, and Government Exhibit 2506 at page 3273.

(The letter from F. M. Prall to Dr. G. M. Karns dated January 26, 1942, was received in evidence and marked, "Government Exhibit No. 2497.")

(The letter from F. M. Prall to Mr. J. E. Hatt dated February 6, 1942, was received in evidence and marked, "Government Exhibit No. 2498.")

(The letter from L. L. Stout to Dr. G. M. Karns dated February 13, 1942, was received in evidence and marked, "Government Exhibit No. 2500.")

5709 (The letter from T. L. Hines to Dr. G. B. Quig dated April 21, 1942, was received in evidence and marked, "Government Exhibit No. 2506.")

Mr. Minicus. All those documents are admitted in evidence. I will attempt to summarize them. If the Court feels it is necessary I will read the pertinent parts.

In 1942 du Pont anticipated that the government might have great need of moistureproof laminated products in the war effort. A determination of policies whereby an adequate supply would be available presented several very difficult questions. First, should du Pont fulfill these needs through its own production or whether production would be expedited by licensing its customers to make these laminations? In this regard the defendant was particularly concerned with the threat to control of its post-war markets for moistureproof cellophane should it permit a great many converters to enter that field at this time.

Whereas the defendant's conclusions as drawn from these documents certainly indicate that the job could be better performed by converters, du Pont decided that such an article would have to be manufactured in their own plants.

Secondly, in any event, if the lamination produced a moistureproofing material, the agreement of 4.26.33 would govern, and du Pont admitted that it was under compulsion again to acquire Sylvania's consent before it could license others 5710 to perform this work.

I have finished this series of documents and am about to begin another section, if you would like to comment, Mr. Gesell.

Mr. Gesell. I think the remarks that I have already made, your Honor, pretty well cover this situation. The series of documents on laminations which I am surprised to find are in this market rather than outside the market and are to be included in the part of trade and commerce we are concerned with were laminations developed during war time, mostly because of special shortages of metals and other articles that came along at that time. Many people began to experiment with ways and means of obtaining laminations that would be substitutes for metal or for moistureproof cellophane. Du Pont took the position indicated at page 3262 that the important-objective and the one that comes first; "Was to move in a direction which will ensure the required quantities of satisfactory material at a fair price for the war effort."

Secondarily, it considered the question as to what steps it should take to protect against a diminution of its right in the product patent because of its failure to assert that patent against people who were infringing by making these various moistureproof laminations, which included plain cellophane plus a moistureproof coating; and, accordingly, in some cases it licensed others to 5711 make the material; in some cases, as these documents show, inquiries were for experimental lots, and it left the experimental lots, nothing came of it because the idea didn't work out, and in other places moistureproof cellophane was provided. None of these people were interested in manufacturing moistureproof cellophane. None of them had the facilities or indicated they were interested in manufacturing moistureprof cellophane. But these laminations came within the claims of the broad product patent which was still then in effect, as well as sometimes the claims of composition and coating patents which du Pont had.

Now, that is all there is to the laminations story, until we get to some of the specific lamination licenses. They are coming along here in another section of Mr. Minicus' case. There was considerable reference to the Interstate Folding Box Company, Item 2499. There is one exhibit thrown in here. The bulk of the exhibits on this come later in his proof. I simply think your Honor may want to mark on 2499 there is a great deal of other documentation relating to that question in exhibits which are to come.

Now, there isn't any question that Sylvania had an exclusive right under the agreement and that we would be violating the agreement if we permitted others to infringe that patent without having Sylvania's permission, and these letters from Mr. Daley, a patent lawyer, and others show concern with du Pont's contractual obligations.

5712 The documents which are also covered in this group though they appear to me to be wholly separate subject, are three documents which were the first three read which were written during the period of the negotiation of the du Pont-Sylvania agreement.

5713 The first of those exhibits, 2811, your Honor will recall I objected to the fact that only a portion of that was read. I would like to call attention to other portions of that document. It was the document from Mr. Pritchard to Mr. May, after he had a talk with Mr. Mencken.

The first thing that is important in the document shows that the idea of settling this patent infringement suit after the suit had been brought came, as I stated in my opening, from Sylvania's counsel. Mr. Pritchard stated in this letter at that time, "Mr. Biesterfeld (who is head of the duPont patent work) and I feel more confident every day as to the strength of duPont's position in this litigation. In other words, all the work that we have been doing tends to confirm the fact that duPont has reasonably good chances to succeed in the litigation."

He goes on to point out that he thinks Mr. Mencken is doing some trading and is not giving all of his real reasons for raising the question of settlement. That document goes to the issue of whether this was a bona fide settlement of a patent controversy.

Now we have two documents to discuss, in addition to that, of this three in the group. One is this unsigned letter or document from Mr. May in which he asks what were the reasons why duPont
wanted to settle. Was it because of lack of faith in the
5714 patents? Well, it is clear that that was not it from the other
documents.

"Is it because we feel that our specific method of moistureproofing is but one of several that will be discovered during the next few years?" Well, it is clear that we got the broad claims, and that wasn't it.

And he says, "Is it because of the desire to minimize competition by restricting the number of manufacturers, a situation likely to ensue if a cross licensing is made between Sylvania and ourselves?" And he suggested if that is it, the thing to do is to accept any terms that they suggest.

It is perfectly clear that after this the negotiations took place and not all the terms that were suggesed by Sylvania were suggested but that this was a hard bargain agreement.

What weight is to be given to that document is difficult to tell. It is not addressed to anyone and appears in the files with a label on the bottom which I fail to understand completely, "import wood pulp."

The other document is Mr. Yerkes' document in which he is arguing that the way this agreement should be settled would be to provide for all of the patents within the moistureproof field being exchanged automatically and freely between the parties. Well, the agreement did not so provide when it was executed because your Honor will recall there was no automatic license.

5715 You had to give notice within three months that you wanted a license, and there were specific provisions for paying additional royalty with respect to major improvements.

He also talks, as Mr. Minicus pointed out, about the question of plain cellophane. This was written before, not after the agreement, and, of course, it is clear that when the agreement was written plain cellophane was not covered within the terms of it.

The two sentences on which Mr. Minicus rests are two sentences in which Mr. Yerkes states that moistureproof cellophane is the article on which we proposed to present a united front in an endeavor to keep other people from manufacturing it and talks about throwing patents into the pot. My feeling is that any fair reading of that in the content of the documents is that that is simply a business man's reference to the fact that this was an exclusive license between the parties, that no one else was going to have any rights under the patents that were licensed, that both parties, as the agreement provided, were going to put down any infringement of the patents. I don't believe that statement is any broader than the agreement itself which did exclusively license between the parties.

Mr. Minicus. The Government is glad to have Mr. Gesell's concession that Mr. Yerkes' statement about a united front and throwing everything into the pot to keep other people from making it is a fair interpretation of what the agreement was intended to do.

5716 As to his other statement with regard to those original three important documents, the only comment that was made on it was that it supported Mr. Gesell's statement in his opening that the original impetus to settle this thing came from the Sylvania Corporation. It is true that Mr. Pritchard reports a conference with Sylvania's counsel there where this matter was discussed and perhaps at the initiative of Sylvania's counsel, because they were worried about other people might get into this thing, too, so that was brought up there; that is quite true. But the date of that was August 4, 1932. Government Exhibit 2478 introduced yesterday shows that this all happened first by Du Pont offering Dr. Wallach an agreement on July 9, 1931, over a year before this discussion by Sylvania. So I still don't think Mr. Gesell has been able to carry his statement that the original impetus for this agreement came from Sylvania. There it is again—it started with Du Pont, 7/9/31.

The other point was one that we had intended to pass over lightly, but since Mr. Gesell has read certain self-serving declarations from 2497, I think we will have to refer to some of the text of those to get them in their proper light.

Mr. Gesell had said that this was more business and Du Pont's only interest was in seeing that the Government got what they wanted for the war effort——

Mr. Gesell. I said no such thing. That is a complete
5717 misrepresentation of what I said to the Court. I said the
primary interest was that.

Mr. Minicus. All right, the primary interest was that. They wanted to see that the Government got what they could as quickly as possible, at the lowest prices and under the best possible conditions.

If we look at the bottom of page 3256, we see the statement that, "Having decided for the moment that there is a possibility that the Government's interests will be best served by our providing customers with film and with moisture-proofing adhesives or the compositions therefor, we discussed the post-war situation." We think that there at that time there was a determination that this job could best be done by these laminators and converters.

Then the document goes on and considers, "Well, my goodness, if we let them do that, where will we stand after the war? What will happen to this domination we have if all these fellows during the war start to laminate this stuff and moistureproof it?"

Then they say—and this appears at the bottom of the first paragraph on 3257—that the whole thing is subject to the necessary permission from Sylvania. What conclusion do they come up with on that? If we look at Government Exhibit 2506 at page 3273, which is dated April 21, 1942—and this other document we were reading from is February 6, 1942—this is a statement by Mr.
T. L. Hines which reads, "In establishing what our policy
5718 should be in regard to producing laminated films, we de-
cided some time ago that where a laminated structure con-

sisting of two sheets of cellophane was to be made which produced a moistureproof film, that such article would be manufactured in our own plants."

Mr. Gesell. Of course you realize you are talking about a wholly different product here in this exhibit than the other exhibit you related to.

Mr. Minicus. No, I don't.

Mr. Gesell. You can't add apples to pears, your Honor.

Mr. Minicus. It has been done.

Mr. Gesell. I have seen it for the first time.

Mr. Minicus. The next subject, your Honor, is still under the general heading of interpretation of the agreement of April 26, 1933, and its amendment in 1938, and it concerns a certain license issued to the Marathon Corporation. In the index the heading does not change. It is still under interpretation. In the trial brief our contentions with regard to this license are found in paragraphs 113 and 115.

A patent license dated September 19, 1939, to the Marathon Paper Mills Company at Rothschild, Wisconsin, constitutes the sole instance in which a stranger to the Du Pont-Sylvania relationship received rights to moistureproof regenerated cellulose film. Whereas the exhibits under this heading vividly 5719 demonstrate the collusive nature of the cross-licensing agreement in its operation, they have been included under this heading because they interpret so clearly the intent of the parties under the agreement of April 26, 1933, even after its amendment in 1938, because the date of this license is 1939. It will become obvious that procedures prerequisite to this extremely restrictive license exactly follow those envisaged in the original contract of April 26, 1933, and that no real change of substance was accomplished by the amendment. In other words, for Du Pont to get this license to Marathon it was necessary for them to go through exactly the identical procedure that it would have been necessary for them to go through under the agrement of April 26, 1933, before it was amended.

It will also be obvious that because of the nature of the license and the restraints imposed upon practice under the patent, that any possible threat of potential competition was negatived by the fact of the license.

The Government offers in evidence Government Exhibit 2524 at page 3309. This is a report from Mr. L. A. Yerkes to the Executive Committee dated November 30, 1939.

(Report from Mr. L. A. Yerkes to the Executive Committee dated November 30, 1939, was received in evidence and marked "Government's Exhibit No. 2524.")

Mr. Minicus. I think that by reading this exhibit, your Honor, it will be possible to avoid reading most, if not all, of two 5720 agreements to follow—in other words, we feel that the agreements are sufficiently described in this memorandum so that we will be able to avoid the lengthy reading of the agreements themselves.

"Agreements With Sylvania Industrial Corporation, and Marathon Paper Mills Company, re License to Marathon Under Du Pont's U. S. Patent No. 1,737,187 in Connection With Coating of Regenerated Cellulose Film, To Be Used as a Cheese Wrapper"

Your Honor's attention is invited to the fact that there is only one patent here subject to license, that is, the so-called article of manufacture patent. None of the process patents are involved, none of the apparatus patents are involved, none of the Sylvania patents are involved, but by this time it had begun to come along—just that article of manufacture patent is the only one licensed here.

"The Marathon Paper Mills Company, Rothschild, Wis., have developed a wrapper for cheese which involves coating regenerated cellulose film with a rubber-wax moistureproofing composition that is covered by their U. S. Patent No. 2,054, 113 (issued September 15, 1936)."

So it is clear now that what we have is that Marathon has developed its own composition for coating regenerated cellulose but desires to do it and requires a license to do it under the patent No. 1,737,187.

Continuing the reading:

"They have been buying our 'Cellophane' film to be coated one side with their composition, the resulting wrapper 5721 being non-transparent and more satisfactory than our film alone for the purpose, particularly because the wrapper can be removed without particles of cheese adhering to the film.

"Use of Marathon's coating in this manner infringes our broad parent moistureproof 'Cellophane' patent (U. S. No. 1,737,187 which issued November 26, 1929). We have negotiated a restricted licensing arrangement with them, with the consent of our exclusive licensee for the field of moistureproof regenerated cellulose film, Sylvania Industrial Corporation, as outlined in two agreements which we now request your authority to execute on behalf of du Pont, in substantially the attached form as approved by the Legal Department, viz:

"(1) Agreement with Sylvania Industrial Corporation to modify our license agreement covering moistureproof regenerated cellulose film, dated April 26, 1933, as amended July 12, 1938, so that du Pont may be free to grant a restricted license to Marathon Paper Mills Company under U. S. Patent No. 1,737,187 as indicated in Agreement (2) below, a copy of which is attached as Appendix 'A' in the Sylvania agreement.

By virtue of this agreement with Sylvania, du Pont agrees (a) to divided royalties received from Marathon in the ratio of ⅔ to du Pont, and ⅓ to Sylvania; (b) not to waive any provision of
the license to Marathon without prior consent of Sylvania,
5722 and also agrees to notify Marathon in writing before exe-
cution and delivery of the license that same was dependent upon and received approval of Sylvania in the form attached, Agreement (2) below, with the understanding that no modification shall be made without Sylvania's prior approval."

Next to that is a handwritten note: "Was this done? Informally, yes."

So we have the first agreement there whereby just as required under the original agreement of 4/26/33 Du Pont had to go to Sylvania and get their consent to license the Marathon Company under a patent that was entirely Du Pont's.

Mr. GESELL. No, it was required under the amendment, too. The amendment didn't change that. The license was exclusive, and constant reference as to it being contrary to the provisions of the amendment is not so. The patent was licensed exclusively to Sylvania.

Mr. MINICUS. That was one of the things I was going to discuss, your Honor, immediately after lunch. If we look at that first license of 4/26/33, it says in the first grant that a non-exclusive license is given. Then you get that 180-degree turn back around paragraph 16 where it says, yes, but they have got to go and get the consent. Now this is exactly what they have done
here again. In other words, that is what I am saying ex-
5723 actly, that this amendment of 1938 changed nothing but
the language.

Mr. GESELL. As far as exclusivity is concerned, there is no dispute between us, your Honor. I made that clear in my comments on the agreements. This was exclusive both before and after the amendment.

Mr. MINICUS. I certainly think there had to be some understanding then outside of that original agreement, your Honor, when it says that it is a non-exclusive grant and everybody apparently knows it is exclusive. Our position is that the whole thing has been exclusive, that it has been an exclusive patent pool.

"(2) Agreement with Marathon Paper Mills Company, dated September 19, 1939, under which du Pont grants Marathon a non-exclusive license under U. S. Patent No. 1,727,187 to coat viscose regenerated cellulose film with a rubber-wax composition, covered by Marathon's U. S. Patent No. 2,054,113, for the purpose of producing only a non-transparent film.

Provisions of this license are:

(a) Du Pont licenses Marathon to coat said film and to sell said coated film, with right to sub-license its customers to sell said film, only for the packaging of cheese.

(b) Marathon's license is limited to the continental U. S.,
5724 i. e. no license is granted to Marathon or its customers to
make film for sale either as film or in the form of wrapper
on a cheese package outside of continental U. S.

(c) During period of license, Marathon acknowledges validity of U. S. Patent No. 1,737,187 as far as scope of license is concerned, and agrees not to consent validity thereof, or assist others in any infringing operation, or suit instituted by du Pont for infringement of said patent. As far as is reasonably possible, and as long as Marathon is licensed under this patent, it agrees to assist du Pont, at du Pont's expense, in maintaining the validity of said patent.

(d) Marathon agrees to pay du Pont as royalty 2 cents per pound for every pound of regenerated cellulose film coated by Marathon pursuant to this license.

(e) Du Pont reserves right to cancel the license on 30 days' written notice to Marathon if any provisions of the agreement are not kept by Marathon.

(f) Marathon reserves right to cancel the license on 30 days' written notice to du Pont if unlicensed competition by the sale of a product infringing U. S. Patent No. 1,737,187 adversely and substantially affects Marathon's sales of the licensed product,
i. e. if this condition has existed for 3 months and du Pont
5725 has not after due notice by Marathon either sued infringer,
or succeeded in abating the infringement. Marathon shall
also have right to cancel agreement, following final decree in a U. S. Court declaring invalid claims of U. S. Patent No. 1,737,187 under which Marathon is operating, but such right to cancel shall not exist as long as Marathon is operating under a claim of this
patent which has not been declared invalid."

5726 "(g) Du Pont agrees not to grant license under U. S.
Patent No. 1,737,187 for the making and selling for use
in the wrapping of cheese throughout continental U. S. of regenerated cellulose film coated with a rubber-wax composition, upon terms more favorable than those granted to Marathon, without permitting Marathon upon written request to du Pont to avail itself of such more favorable terms. This does not apply to any license granted by du Pont and in effect prior to date of this agreement.

"(h) Du Pont shall be under no obligation to institute a suit or prosecute infringers of U. S. Patent No. 1,737,187, nor shall du Pont be responsible to Marathon for failure to prosecute infringers. If du Pont elects to prosecute any infringer, the conduct of such suit shall be entirely directed by, and any recoveries therein shall belong to, du Pont.

"(i) This agreement shall not be assignable except to the successors of the entire business of the parties relating to the subject matter of the licensed patent.

"Any subsidiary, in which Marathon may own more than 50% of stock entitled to vote for directors may elect at any time to accept a license from du Pont and the same terms and conditions of the agreement with Marathon."

That ends the description of the two agreements. Then there is a further comment:

5727 "Marathon have made an exclusive arrangement with Kraft-Phenix Cheese Corporation for the use of the cheese wrapper referred to above. At the present time, 2 and 5-pound packages of cheese are so wrapped, and there is a possibility that the use of this wrapper will also be extended to smaller packages.

"During the last 4 years our sales of 'Cellophane' film to Marathon have been as follows:

"Pounds of 'Cellophane' Film, year, 1936, Regular, 39,680; Moistureproof, 5,311; Total, 44,991."

There is also information for the years 1937, 1938, and 10 months of 1939 which I will not read into the record.

"Some of this film has been used by Marathon for other purposes, but most of it applied to the cheese wrapper starting in 1938 when regular 'Cellophane' was used. Switch was made to moistureproof 'Cellophane' late in 1938. This continued throughout most of 1939, but the present indication is to revert to a type of regular 'Cellophane' satisfactory for their purpose.

"We have been working with Marathon and Sylvania on this difficult problem for some time, and it will be noted that we have dated the license to Marathon as of September 19, 1939, without any provision for royalties prior thereto.

"It is estimated that annual royalty income to du Pont from Marathon under this license will run from $6,000. to 5728 $8,000., i. e., after paying Sylvania the 1/3 provided in our separate agreement with them."

The government offers in evidence Exhibit 2515 at page 3287. This, your Honor, is the agreement between du Pont and Sylvania whereby Sylvania consents to du Pont's licensing Marathon under the restrictive license described.

(The agreement between du Pont and Sylvania dated September 19, 1939, was received in evidence and marked, "Government Exhibit No. 2515.")

Mr. Minicus. I particularly invite your Honor's attention to Paragraph No. 2 which provides for the division of royalties between du Pont and Sylvania, and to Paragraphs 4 and 5 where the necessity for further consent is brought out.

The second part of Exhibit 2515 is the license whereby du Pont restrictively licensed Marathon under Patent 1,737,187

Now, we maintain that evidence probative of the accompanying intent and operations under the Marathon agreement bear a two-fold function in support of the government's interpretation of the understanding between du Pont and Sylvania; to-wit, one, that the patents in the field of moistureproof cellophane were pooled with the intent and effect of excluding all strangers to the relationship and the manufacturer and sale of cellophane
5729 except under very rigidly prescribed conditions, and certain exclusionary aspects that we believe the evidence establishes in conjunction with this consent agreement and restrictive licensing agreement, and under this heading we intend to explore the necessity of Sylvania's consent, the provision for the splitting of royalties, certain statements indicating that this is rather an unusual situation and there isn't an intent at that time to license others under these patents, and the acknowledgment of the validity. Secondly, our evidence will consider the owner's restraint imposed upon Marathon which rendered that company impotent as a possible supplier of cellophane itself. These restrictions were dictated as necessary concommitants, we state, of the agreement of April 26, 1933, rather than a reflection of du Pont's own policy determined independently of outside influences. Once again the Sylvania agreement governed rather than the patents.

Beginning with what we call the patent pooling aspects of this thing I offer in evidence a series of documents designed to show the incapacity of the du Pont Company to license under its own moistureproof patents, even in this instance under its own patent, to a customer without the consent of Sylvania. We saw that clauses 1, 4, and 5 of the du Pont-Sylvania agreement of 1939—that is, this consent agreement that we have just discussed—that not only is du Pont disabled from licensing under its own patents, but is cannot modify such licenses when existing without
5730 Sylvania's consent. Thus before anyone outside the manufacturing level of the industry can operate within the sphere of moistureproof cellophane it was necessary to acquire the mutual approval of 100% of the producers already therein.

In other words, if a new fellow wanted to come in, like joining a fraternity, he had to get by without any black balls at all.

Plaintiff's contention in this matter is borne out by the following documents which it now offers in evidence, and there are some of these documents that are new documents and have not been submitted in the bound volumes. I will hand up a copy for the custody of the Clerk at this time.

Government Exhibit 2517 at page 3302

* * * * *

5732 The **Court.** That is 2516 and 2517?

Mr. Gesell. The has not offered 2516, your Honor. It is just in the list. The only one he has offered is 2517.

While I am on my feet it might be your Honor would like to have a piece of this Marathon wrapper to give a little life to what we are talking about.

The **Court.** Explain to me, Mr. Gesell and Mr. Minicus, what is this? Is it plain cellophane going through a lamination process?

Mr. Gesell. That is not a lamination, your Honor,
5733 from my understanding. That is cellophane coated with a
preparation which Marathon has patented, and it is——

The **Court.** Moistureproof?

Mr. Gesell. No, it is plain. There would be no need of a patent at all if it was moistureproof, because if they coated moistureproof our position was they did not need a license, because they had an implied license with the sale of the moistureproof itself. It was only when they took plain and sought by some process to make it moistureproof that that issue arose.

Mr. Minicus. I haven't had an opportunity to view that, your Honor.

The **Court.** Here you are.

Mr. Gesell. Here is a piece.

The **Court.** I think I will adjourn Court at this time, Mr. Minicus. See if you can work out some technique whereby you can get your authentication.

Mr. Minicus. We are not particularly worried about these documents, your Honor.

The **Court.** Adjourn Court to tomorrow morning at 10:30.

(At this point the trial was adjourned to Thursday, April 26, 1951, at 10:30 o'clock, A. M.")

* * * * *

5736 Thursday, April 26, 1951, 10:30 O'clock A. M.

Present: As before noted.

Mr. Minicus. Your Honor will recall at the close of the session yesterday the Government introduced an agreement into evidence whereby duPont licensed the Marathon Corporation to operate under the article of manufacture patent and on another agreement whereby Sylvania consented to the licensing of Marathon by duPont. We claim that the evidence would show dual operation of this series of agreements, that there would be certain reflections of the exclusive patent pooling aspects of the duPont-Sylvania relationship disclosed by the evidence, and also that the evidence would show a building up of this monopoly particularly within this field by virtue of the restraints that were imposed upon the Marathon agreement in the license.

In considering the patent pooling aspects of the Marathon license and the consent by Sylvania, we offered in evidence, and I believe they were admitted in evidence, certain documents, Government Exhibit 2892, Government Exhibit 2900, Government Exhibit 2902, Government Exhibit 2555 and Government Exhibit 2906. These documents would show the incapacity of the defendant corporation to license third parties under the moistureproof patents in the absence of the consent of Sylvania.

I will just read briefly from a few of the documents.

5737 Reading from the second paragraph of Government Exhibit 2892, which is a letter from Mr. Hatt to Mr. Allen Abrams, Technical Director, Marathon Paper Mills Company, dated September 5, 1939:

"We did not understand why you felt you required the right to cancel the license at any time for any reason. We have gone to some length to get a concession from former licensees to make such a license possible and we have indicated definitely our desire to cooperate with you in the production of this type of material. Without further detail regarding the matter of cancellation, we felt that having made such an arrangement that it should stand and be cancellable only for violation or specific cause."

Reading now from the second paragraph of Government Exhibit 2900:

"You may be wondering in your mind about the length of time these negotiations have taken, but I don't believe you appreciate the fact that when the writer undertook to get this contract for you that the situation then was a closed book, in that we already had an exclusive licensee and whose consent we had to attempt to secure by satisfying them that this was not opposed to their interests and to show them that some benefit would accrue to them in its execution."

Finally in this group, reading from the final paragraph of Government Exhibit 2906—this is a letter from Mr. Charles F. Daley to Mr. Allen Abrams dated January 9, 1940:

5738 "Before concluding your license agreement under Church and Prindle Patent No. 1,737,187, du Pont wishes it understood that du Pont's right to make said agreement or grant any license under that patent depends on the consent of another licensee, namely Sylvania Industrial Corporation, and that Sylvania Industrial Corporation has granted consent to the agreement as now drawn on the understanding that no waiver of the provisions of said agreement or other modification of the agreement shall be made unless the written consent of Sylvania is first obtained."

5739 Return now to another and very definite pooling aspect of this Du Pont-Sylvania relationship as it is manifested in the Marathon license, and that is an agreement between Du Pont and Sylvania whereby they are to split the fruits of this license to Marathon. In other words, royalties from Marathon are to be divided between Du Pont and Sylvania.

Now, note that there are no Sylvania patents ever licensed to Marathon, yet Sylvania received a financial gain from the licensing of this Du Pont patent to Marathon. It is clear that Marathon was only licensed under the article of manufacture patent, and when one appreciates from the terms of the agreement that Marathon was only licensed to coat plain cellophane in such a manner that it would be non-transparent, we see then that Marathon is only operating under Claims 1 and 4 of that agreement, because all the other claims provide for transparent sheeting.

The Court. What was the rate of royalty?

Mr. Minicus. 2¢ a pound, I believe.

The Government offers in evidence Government Exhibit 2523 at page 3308, Government Exhibit 2907, Government Exhibit 2526 at page 3313, Government Exhibit 2908, Government Exhibit 2913, and Government Exhibit 2914.

Inasmuch as Government Exhibits 2907, 2908, 2913, and 2914 are new documents I will now hand copies up to the Court.

(The memorandum to L. A. Yerkes dated November 30, 1939, entitled "Agreements with Sylvania and Marathon" was received in evidence and marked, "Government Exhibit No. 2523.") 5740

(The letter from Marathon Paper Mills Company to Mr. Charles F. Daley dated February 5, 1940, was received in evidence and marked, "Government Exhibit No. 2907.")

(The letter from Charles F. Daley to Dr. Worth Wade, Sylvania Industrial Corporation, dated February 22, 1940, was received in evidence and marked, "Government Exhibit No. 2526.")

(The letter from Charles F. Daley to Mr. Allen Abrams, Marathon Paper Mills Company, dated February 28, 1940, was received in evidence and marked, "Government Exhibit No. 2908.")

(The letter from Charles F. Daley to Mr. Allen Abrams, Marathon Paper Mills Company, dated June 27, 1945, was received in evidence and marked, "Government Exhibit No. 2913.")

(The letter from Allen Abrams, Marathon Corporation, to Mr. Charles F. Daley, dated June 29, 1945, was received in evidence and marked, "Government Exhibit No. 2914.")

Mr. Minicus. It will be seen in thees documents that the seller of the plain cellophane to Marathon, whether it be Du Pont or Sylvania—and Marathon could acquire plain cellophane from no other source—invoiced Marathon and included in the invoice a separate charge of 2¢ per pound royalty. The returns from this charge were maintained by both companies in a separate fund,
and periodically clearances were effected between Du Pont
5741 and Sylvania. In other words, at the end of each quarter
Du Pont forwarded a check for one-third of the royalty received from Marathon to Sylvania, and Sylvania responded with a check for two-thirds of the receipts it had gotten.

Now, we submit, your Honor, that stronger evidence could not be offered to the Court to establish that Sylvania and Du Pont had come to consider that all the moistureproof patents were common property when they both began to participate in the fruits of that property.

The Court. I don't know what relevancy it has, but what was the quid pro quo moving to Du Pont for sharing its exclusive monopoly under the patents to to moistureproof patents? I don't consider them as being particularly eleemosynary. What was the bargain they made according to the Government's theory?

Mr. Minicus. In the Marathon relationship or the Sylvania relationship?

The Court. Using the Marathon relationship as an illustration. I understood you to say that this is evidence that Du Pont now shares exclusively with Sylvania control over moistureproof patents. I want to know what did Du Pont receive, if that was the status, because that would seem to me it would be giving up a great deal. What did it get in return?

Mr. Minicus. From Sylvania?

The Court. Yes.

5742 Mr. Minicus. In the first place, at the inception of the agreement we have seen that a suit was cancelled in which Sylvania had challenged the validity of these basic five patents. Now, we maintain that by being enabled thereby to remove these very important patents to them from the jeopardy of a judgment of invalidity that that was a very important consideration for them. In addition we have seen and we will show that Du Pont received enormous royalties from Sylvania for sharing in the use of these patents. I think those two aspects are quite important considerations.

Of course, there is also the other consideration, the possibility that Sylvania, too, some time during the course of the intervening twelve years after the agreement was signed, itself gave Du Pont a very radical and important invention in this field, and in that event DuPont would have had an exclusive license automatically under it.

5743 These documents, your Honor, all bear on the splitting of royalties. I will just read one or two to illustrate how it was accomplished. Reading from the second paragraph of Government Exhibit 2526, which it a letter from Mr. Charles F. Daley to Dr. Wade, Patent Attorney in the Sylvania Industrial Corporation, dated February 22, 1940:

"I have been away for the past two weeks, but on my return, I received a letter from Marathon stating that they are prepared to execute the agreement, but they wish to know whether they can designate on orders for plain transparent film, whether purchased from du Pont or Sylvania, that they are to be used under the contract, and they would like to have the two cent royalty added to the purchase price of the film by du Pont or Sylvania, whichever is the seller. They ask that this be done in order to assist them in their cost accounting and in their records."

Then from the fourth paragraph:

"It will of course be necessary for du Pont and Sylvania to report royalties received from Marathon periodically, let us say, withing thirty days after the end of each quarter, and the two companies can then apportion the royalty according to the ratio set forth in the du Pont-Sylvania agreement."

I think, your Honor, that that is sufficient to illustrate the way this splitting of royalties was accomplished.

Turning now to certain documents, three documents that 5744 we claim show a statement of intent as of that time on the part of the duPont Company not to license any other people, that this was rather an unusual situation, this Marathon agreement, and it did not indicate an opening up of the grants to persons outside the industry for moistureproofing plain cellophane.

The Government offers in evidence Government Exhibit 2896, 2897 and 2898. These are all new documents and I hand up copies of each to the Court. The defendant has been supplied with copies.

(Letter from Allen Abrams to Mr. Hatt dated September 16, 1939, was received in evidence and marked "Government's Exhibit No. 2896.")

(Telegram from Mr. Hatt to Allen Abrams dated September 18, 1939, was received in evidence and marked "Government's Exhibit No. 2897.")

(Letter from Allen Abrams to Mr. Hatt dated September 19, 1939, was received in evidence and marked "Government's Exhibit No. 2898.")

Mr. MINICUS. It is submitted that herein Marathon requested that the favored nation clause in the contract be extened to include future licenses to moistureproof cellophane for any purpose. duPont refused on the ground that it did not then consider that there would be any further licensees. To support that position I read from midway through the second paragraph of Government Exhibit 2896. This is a letter from the Marathon

5745 Corporation, Mr. Allen Abrams, to Mr. J. E. Hatt, dated September 16, 1939:

"It was my understanding that this favored nation cause was to cover any who might moistureproof cellophane. Should it not then be drafted to read that duPont agrees not to grant any licenses for moistureproofing regenerated cellulose, under the Church et al. patent, on more favorable terms than those granted to Marathon? In other words, it is our understanding, that irrespective of the use to which the moistureproofed cellophane is to be put, no one will buy the PT sheet for moistureproofing purposes at a lower cost than us. Surely this would appear to be a fair arrangement and it was our quite definite understanding."

In response to that we have a telegram in Government Exhibit 2897 dated September 18, signed J. E. Hatt. The first part of the telegram states, "See no necessity for changing paragraph six. Do not at this time contemplate other licensees. Stop."

Then in 2898 we have the final answer from Marathon to Mr. Hatt in a letter dated September 19:

"This will acknowledge receipt of your wire of September 18th replying to my letter of September 16th, wife reading as follows:" and then the wire portion which I have just read is set forth verbatim.

Then the final paragraph:

5746 "In view of the fact that the agreement as sent to us per your letter of September 8th appears to be as complete and explicit as you will consider making it, we are having the agreement signed and sealed."

Now, still under this general subject of the patent pooling, exclusive patent pooling aspects of the Marathon agreement, we turn to correspondence dealing with the paragraph in the duPont-Marathon license setting forth the acknowledgment by Marathon as to the validity of the duPont patent. This is found in paragraph 3 of the duPont-Marathon license wherein the latter expressly acknowledges validity of the claim in the moistureproof patent and covenants to assist duPont in maintaining the validity of these claims. The documents in support of this position are offered as Government Exhibits 2889, 2890, 2894, 2903, 2904 and 2905. These are new exhibits, your Honor. They were the last exhibits the Government put into the case, and that is the reason for the high numbers. I hand up copies of the new documents.

(Letter from The Menasha Products Company to Mr. Lake dated August 25, 1939, was received in evidence and marked "Government's Exhibit No. 2889.")

(Letter from Mr. Lake to Menasha Products Company dated August 30, 1939, was received in evidence and marked "Government's Exhibit No. 2890.")

(Letter from Allen Abrams to Mr. Hatt dated September 7, 1939, was received in evidence and marked "Government's
5747 Exhibit No. 2894.")

(Letter from Allen Abrams to Mr. Hatt dated November 17, 1939, was received in evidence and marked "Government's Exhibit No. 2903.")

(Letter from Mr. Daley to Mr. Abrams dated November 20, 1939, was received in evidence and marked "Government's Exhibit No. 2904.")

(Letter from Mr. Abrams to Mr. Daley dated November 23, 1939, was received in evidence and marked "Government's Exhibit No. 2905.")

Mr. Minicus. I will merely read from Government Exhibit 2905, which is a letter from Mr. Allen Abrams of the Marathon Paper Mills Company to Mr. Charles F. Daley summarizing the correspondence that has preceded and the conclusion that has been reached with relation to this acknowledgment of validity.

"Dear Mr. Daley: This will acknowledge receipt of your letter of November 20th. We note your comment with reference to the cancellation of paragraph 4, from Article 5. It is true that the cancellation of such a paragraph will give us continuing license to moistureproof cellophane for the particular wrapper we are now making."

If I may illustrate what that has reference to, Marathon at this time was requesting duPont to change the draft of the agreement in such a way that it would give Marathon the
5748 right to cancel the license should it discontinue moistureproofing this plain cellophane with its own composition, and duPont rejected that suggestion and insisted that Marathon even though it discontinue moistureproofing the cellophane remain subject to the terms of the agreement. Mr. Abrams says in

that regard, in the second paragraph, "On the other hand, it will bind us with respect to assisting in infringement suits re Church and Brindle 1,737,187; and also will require acknowledgment of validity—all this despite the fact that we may at some time completely discontinue this type of coating.

"I am asking Dr. Rossman to consider this whole matter fully, with the suggestion that he then take it up with you so that a final decision may be reached."

The Court. Well, I am not getting the point on this feature of the case, Mr. Minicus, with respect to the following: If there is one bastion left in the law of patents in this country it is that a licensee cannot attack validity whether it is in the agreement or not in the agreement. So I am not getting the force and effect of your underscoring of this insistence on the admission of validity. As a matter of law they would be bound to admit it. As recently as last year the Supreme Court refused to deny that doctrine.

Mr. Minicus. Yes, but here is a case, your Honor, where the company itself would discontinue the manufacture and they
wanted the right to be able to terminate the agreement if
5749 they did discontinue the manufacture, and the duPont
Company says, "Oh, no, even though you discontinue operating under the patent, the patent must still remain operative," and Mr. Abrams of Marathon Company says, "Well, what is this? We won't be operating under the agreement and yet we will still be not only bound to admit the validity of it but we will be bound to assist duPont in any suits they may have to establish the validity of it." Afterwards for all intents and purposes they are not interested in the agreement any longer.

Mr. Gesell. That is directly contrary to the third paragraph in Exhibit 2904, which is before your Honor.

Mr. Minicus. Now, 2904 is responded to by 2905 and certainly that is the way that Mr. Abrams felt about it. He says, "On the other hand, it will bind us with respect to assisting in infringement suits * * * and also will require acknowledgment of validity—all this despite the fact that we may at some time completely discontinue this type of coating."

This is in response to the document that Mr. Gesell just referred to. Certainly Mr. Abrams agreed with my interpretation of it, regardless of what it said in 2904.

Mr. Gesell. Surely the test is what the defendant here understood it to mean in the letter that it wrote to the licensee.

The Court. What is that paragraph that Mr. Gesell mentioned? Read it.

5750 Mr. Gesell. The third paragraph on the first page of
2904 which says, "As I see it, even without the cancelled

paragraph, there is no commitment to be performed by Marathon after it ceases manufacture of the licensed product which would be at all onerous."

Mr. MINICUS. Now, there if you refer to the first paragraph, your Honor, you will see they're talking about something entirely different than this acknowledgment of validity. There they are talking about royalties and duPont is pointing out to them, "Well, if you don't insist upon cancellation or termination of the license after you cease operation under it, why, you can just lay off for a while and begin again later on," but certainly that did not convince Mr. Abrams who several days later answered the letter as I have read it.

5751 Now, I would also point out to your Honor that despite this implied or assumed acknowledgment of validity by a licensee—and I think that it is only applied while the licensee is operating under the patent—the terms of these agreements are not limited that way. I don't think there is anything wrong with a licensee terminating his patent and then in a subsequent infringement suit denying the validity.

The Courts have held here, the Cracking case, U. S. versus Standard Oil Company—Mr. Gesell has depended on it at various times—points that out very vividly, and they have taken the position—and the Government draws on that for precedent in its position here—for example, this is at page 630 of 33 Fed. 2d:

"For example, sections 1, 2, 3, and 4 of this same agreement 31 provide that the contracting parties shall acknowledge the validity of all patents that may be issued to the other 'as and when issued under which it becomes licensed hereunder.' Section 1 of the same agreement defines the term 'patent rights' as including all patents and pending applications 'and all inventions relating to processes and apparatus for the manufacture of gasoline and other light oils by cracking under pressure, acquired prior to January 1st, 1937.' Section 3 grants, each to the other, licenses to continue to the expiration of any patents included within the aforesaid 'patent rights.'

5752 "These agreements do not expire until 17 years from January 1, 1937. Or, stated in another way, the agreement which was made August 26, 1921, protected patents from attack which might be issued as late as January 1, 1937, and which would not expire until 1954."

Then the court goes on to say:

"Such agreements cannot be sustained. While a patent is presumptively valid, many of them, although duly issued, are invalid for various reasons. The public, in whose interest the patent laws are enacted (Kendall v. Winsor, 21 How. 322, 16 L. Ed. 165), is ordinarily protected against the burden of such void patent grants by the action of competitors of the patentee who, prompted by motives of self-preservation, refuse to recognize these void patents, and therefore successfully contest them. The public is thereby relieved of the burden which their existence entails.

"By these clauses of agreement 31 and similar clauses in the other agreements, the parties purchased immunity from attack on their patents. Tying the hands and sealing the lips of the only parties who would ordinarily stand suit and contest the validity of the patents, the primary defendants attempted to fasten on the public burdens which it was not the purpose of the patent law to impose. Such agreements violate the letter and the spirit of the patent law, and are contrary to public policy. The far-reaching consequences of such agreements
5753 is illustrated by the present case."

Then in United States versus General Instrument Corporation——

Mr. GESELL. Just a moment. I think I am entitled to rise and point out that the decision just read was reversed by the Supreme Court.

Mr. MINICUS. I think that is really funny, your Honor. To use that statement—I will explain why it was reversed by the Supreme Court, because at the suggestion of this Court these acknowledgments of validity and the other restrictive agreements that are mentioned here were cancelled before it got to the Supreme Court, and the Supreme Court says on that basis as long as they are cancelled, we will reverse.

Mr. GESELL. That is not what happened.

Mr. MINICUS. I say it is.

Mr. GESELL. I know you do, but that is not what happened. The Government argued its whole future patent point in its brief in extenso in the Supreme Court, and the Supreme Court set them back on their heels.

Mr. MINICUS. Is that so? Then isn't it very strange, your Honor, that twenty years later we find United States versus General Instrument Corporation at 87 Fed. Supp. 157, at page 190 stating—and this is 1949, and the following provision was in the agreement there:

"Each of the parties hereby admits the validity of all
5754 the Letters Patents in Schedules A. B. and C. hereof and agrees to admit the validity of all the Letters Patents which may hereafter be acquired from whatever source by the second contracting party, and each of the parties agrees not to contest or aid in contesting, directly or indirectly, the validity of any of such Letters Patents."

In commenting upon this agreement generally,—he was talking about the whole agreement here—Judge Forman said at page 190:

"From the initial 1934 agreement General and Radio controlled well over 50% of the radio condenser industry in the country and dominated the industry. Although they contended that the primary purpose of their agreements was to resolve patent litigation, the course of conduct followed by them demonstrates that it was to insulate their patents from outside and inside attacks in order that they might continue a dominating position in the variable condenser industry to their mutual advantage and to the restraint of trade in interstate commerce."

Now, again, the United States Supreme Court, this time as far back as 1891, in Pope Manufacturing Company against Gormully, at page 234 of 144 U. S.:

"It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly; and
5755 it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice."

There is the basic policy announced by the United States Supreme Court on which our argument is based. I have shown you, your Honor, that the lower court in the Cracking case held right on this point and it was not reversed on that ground, and I have also shown your Honor that the language of the General Instrument case, twenty years afterward, is along the same line of legal reasoning—to protect against attacks from outside and inside the industry.

I leave it to good, common sense, Your Honor.

The Court. All right. If you owned a patent and you gave me a license would you want me to be free to attack the validity of it?

Mr. Minicus. No, but I am not the public interest, your Honor.

The Court. What we are doing is we are testing intent, as I understand it, with the defendant who is in this Court.

Mr. Minicus. I wonder if when you and I are trying to settle a point of view, your Honor, if we could be free from background noises? It distracts me and I can't reason and understand
5756 with that constant noise back there. I think it is most discourteous.

The courts were not talking about the patent owners in these cases, your Honor. They were looking to the public interest. As the court said, there is the right that the public has to be relieved of the burden of worthless patents, and if everyone in the industry finally brought under one of the acknowledgment of validity clauses, who is left to attack the patents? All you have to do is get a patent on a particular thing where you have a very few people interested in the industry, get them all lined up to acknowledge the validity of your patent, and for the next 17 years you are absolutely secure, and you could have the weakest patent in the history of the Patent Office. Again, your Honor, we are not under the patent laws here; we are under the anti-trust laws, and I think that is the position that the court took in the Standard Oil case. We have that authority for it and we presented our evidence under that authority.

Now, leaving our consideration of the direct reflections found in documents pertaining to this Marathon license, we turn to certain indirect aspects of the illegal pooling arrangement as manifested in the direct restrictions upon the Marathon Company itself to be sure there would be no possibility that Marathon, through the very limited rights it had here to moistureproof plain cellophane, would ever interfere with the dominant position in the industry held by Du Pont and Sylvania.

5757 Now, Paragraph 1 and 2 of the Du Pont-Marathon agreement are very expressive that Marathon can only moistureproof cellophane, one, by a particular coating of its own manufacture; two, to produce a non-transparent wrapper; three, to be used for cheese; four, for sale within the United States only. In other words, there was a ticket on that train for that day only.

Now, the Government's exhibits illustrate the ramifications of this narrowly restricted license.

The **Court**. Do you know who said that?

Mr. **Minicus**. I am not going to guess again.

The **Court**. Owen J. Roberts.

Mr. **Minicus**. We offer in evidence Government Exhibit 2888, Government Exhibit 2909, Government Exhibit 2910, Government Exhibit 2911, and Government Exhibit 2912. These are all new documents which I hand up copies of. The defendant has been provided with copies.

(The letter from Charles F. Daley to Dr. Joseph Rossman dated July 5, 1939, was received in evidence and marked "Government Exhibit No. 2888.")

(The letter from L. E. C. to Mr. E. C. Lake, dated December 31, 1940, was received in evidence and marked, "Government Exhibit No. 2909.")

(The letter from E. C. Lake to Menasha Products Company, attention Mr. Leo E. Croy, dated January 15, 1941, was received in evidence and marked, "Government Exhibit No. 2910.")

5758 (The letter from L. E. C. to Mr. E. C. Lake dated January 29, 1941, was received in evidence and marked, Government Exhibit No. 2911.")

(The letter from E. C. Lake to Mr. Leo E. Croy, Menasha Product Company, dated February 10, 1941, was received in evidence and marked, "Government Exhibit No. 2912.")

Mr. **Minicus.** The documents will show that in 1939 Du Pont insisted on this limitation of non-transparent cheese wrappers although Marathon sold cellophane which it purchased largely from Du Pont to general users and was moistureproofing with its own coating process and apparatus. As I said before, all Marathon needed was a license under the very broad claims 1 and 4 of the patent. The documents will also show that in 1941, two years later, Marathon solicited Du Pont to extend its licensed operations to process meats. Over and above cheese they wanted to use this stuff on meats, using the identical same wrapper that they were licensed to make moistureproof with its own composition, and Du Pont summarily refused and urged that if Marathon wanted to sell this stuff for meat wrapping that they buy Du Pont or Sylvania moistureproof.

Reading from the fourth paragraph of Government Exhibit 2888, which is a letter from Mr. Charles F. Daley to Dr. Joseph Rossman of the Marathon Company, dated July 5, 1939:

"As to Article 2, the license must remain non-exclusive and must be limited to the packaging of cheese. As to the latter,
5759 this was discussed with Mr. Croy in Chicago at the time of our conference, and he understood that if fields of interest other than cheese attained any importance, they could be negotiated separately."

Then the following paragraph illustrates another restriction in this license.

"As to your suggestion that the license be broader than continental United States, any change here will result in a number of complications. I believe however, that we can agree on one change, subject to the usual approvals required on this agreement in our Company, namely, that Church & Prindle Patent 1,737,187 will not be used to prevent exportation of the packaged cheese by Marathon's customer."

Now, I wonder what sort of patents the Patent Office was issuing in those days that had extraterritorial effect? The courts have held that you can't bar a manufacturer in the United States from exporting a product that he has made under a license, and yet that is apparently what is going on here. I wonder why?

The **Court.** Don't you wonder; you tell me what you think.

Mr. **Minicus.** I think it is quite apparent, your Honor, this is proof of the great big broad foreign relation section that we went into earlier. Du Pont was taking care of their friends
5760 abroad here. They don't want this moistureproof stuff going into the European market.

Reading from Government Exhibit 2909, which is a letter from Marathon to E. C. Lake dated December 31, 1940, Marathon says in this letter:

"I am attaching hereto sample wrappers of Parakote-Cellophane which are identical to our processed cheese wrapper but designed for packaging ground and processed meats, such as the various sandwich loaves you see on the market today. The finished package would be produced on the same type of machinery equipment now used for the packing of processed cheese.

"We have experimented extensively with both moisture-proof-one-side Cellophane and P. T. Cellophane, and find that the operation and in the slicing operation in the retail market."

The sentence apparently does not make a good deal of sense. I will continue:

"As you know, Parafilm adheres better to P. T. Cellophane than to M. S. D. T. Cellophane, and the general all around results are more satisfactory.

"The attached samples are taken from the first order we have produced of this material, which, as you can see is for the Oscar Mayer Company, Madison, Wisconsin. We appreciate the fact that coating, as per these samples, on P. T. Cellophane is not covered by our agreement with you; however, it being a small order and in the nature of an experiment, we hope you may have no serious objection.

5761 "Our main purpose in writing you in regard to this package is to approach you on the question of extending our license agreement on the use of P. T. Cellophane coated with Parafilm to include this product—namely, wrappers for meat packaging."

5762 Then on January 15, over two weeks later, they write again and say they haven't heard from the duPont Company on that request.

On January 29, 1941, they ask again whether any decision has been reached.

Finally on February 10, 1941, Mr. E. C. Lake, of the duPont Company, writes to Mr. Leo E. Croy, Menasha Products Company, as follows:

"Referring to yours of January 29, I regret very much the delay involved in answering the question raised in your letter of December 31 but, as it involves matters of broad importance, with ramifications in several other directions, it could only be decided after very careful exploration by our Management and our Legal Department.

"After very careful consideration, our Management believes it unwise to extend at this time the licensing arrangement between du Pont and Marathon Paper Mills Company to the use of your 'Parakote' coating applied to P. T. 'Cellophane' in the meat industry."

So certainly that restriction was held within the limits and there was no further negotiation to extend Marathon's use of this beyond sheets.

Turning to Government Exhibit 2901, we see a further explanation of the foreign restraint in paragraph 5, the first page of the exhibit:

5763 "3. The wording of the sentence beginning in line 5 on page 3 has been changed to state that no license is given to Marathon to sell outside of continental United States, instead of Marathon specifically agreeing not to sell outside of continental United States."

Mr. Gesell. Are you going to offer that exhibit, Mr. Minicus?

Mr. Minicus. I believe I offered it originally. If I did not it was an oversight. The Government offers in evidence Government Exhibit 2901.

(Letter from Mr. Daley to Dr. Rossman dated November 3, 1939, was received in evidence and marked "Government's Exhibit No. 2901.")

Mr. Minicus. That, your Honor, brings to a conclusion our evidence on the Marathon-duPont-Sylvania relationship and also brings to a conclusion our section devoted to the interpretation of the duPont-Sylvania agreement. I don't know whether Mr. Gesell decided to discuss that at this time or not.

Mr. Gesell. We have just a few very specific points, your Honor, that I would like to mention without much discussion.

Point 1: Marathon's cheese wrap infringed duPont's basic moistureproof product patent. That is shown by Exhibit 2524.

Point 2: duPont having licensed Sylvania exclusively under that patent could not license Marathon without getting Sylvania's consent.

5764 Point 3: Marathon was licensed non-exclusively for a modest royalty as appears from 2515.

Point 4: There is no proof in any of these documents or in any other documents that I know of that Marathon ever wanted to manufacture moistureproof cellophane or ever asked for a license to manufacture moistureproof cellophane.

Point 5: Marathon was free to buy film under this license from either duPont or Sylvania in whatever quantity it wished. It could buy all from one or all from the other, or part from one and part from the other.

Point 6: As far as royalties were concerned, Sylvania shared in that royalty obviously as its share in agreeing to reduce its exclusive right under the patent, and the sharing of such royalties has been frequently recognized as appropriate including the Cracking case.

Now, as far as the question of validity is concerned, the cases that were read to your Honor were cases relating to future patents. There is no acknowledgment here by Marathon of the validity of anything except the one specific patent that was licensed.

And as to the rhetorical question which was asked as to who was left to challenge the patents, it is perfectly apparent if all these large rayon companies were floating around wanting to get into the business, as the Government contends, they were all free to challenge the patents, as were many others.

5765 As to the question of the refusal to broaden the license to include meat wraps, just two points: That that was simply an application of the specific terms of the agreement; and, second, we made it clear in the correspondence throughout that Marathon was always free to buy moistureproof films and do what they wished with them, and that is what they did, and we had a film for wrapping meats, which is disclosed in the correspondence as MSDT film, and we chose to market that ourselves.

Mr. MINICUS. Mr. Gesell has mentioned the consideration in the Cracking case of this question of splitting royalties. I must confess that I don't know what he is talking about because he did not cite page on anything else. I know something that the Cracking case said about royalties, though. At page 174 the Cracking case said:

"The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices," citing National Harrow v. Hench and Blount Manufacturing Company against Yale & Towne.

Also in the Line Material case, the United States Supreme Court said:

"It is not the cross-licensing to promote efficient production which is unlawful. There is nothing unlawful in the requirement that a licensee should pay a royalty to compensate 5766 the patentee for the invention and the use of the patent. The unlawful element is the use of the control that such cross-licensing gives to fix prices."

Again, in General Instrument Corporation, 87 Fed. Supp., there was an arrangement between parties who jointly controlled 65 to 75 per cent of the total production of the country, which provided for a division of royalties which was condemned, the Court saying at page 195:

"General and Radio are not in the position of the defendants in the case of Standard Oil against the United States, where the court declared patent pooling legal. Rather are they within the contemplation of the court in the same case when it said: 'The rate of royalties may of course be a decisive factor in the cost of production.'" And then it goes on to cite the part of the Cracking case that I have cited. That is as we understand the Cracking case.

And if Sylvania had to consent to every single ramification of the Marathon license that duPont granted them—and we see in there it specifically stated in the correspondence I read that Sylvania had to consent to every detail, every waiver, every change—I presume that they also had to consent to the amount of royalty being charged, and the Cracking case says, "If the combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices."

5767 That is all I know that the Cracking case says on this subject, your Honor. I know of no place where the Cracking case says that it is all right to split royalties.

Now, turning to a new subject, still within the duPont-Sylvania moistureproof relationship, the Government will at this time introduce into evidence several series of exhibits, probative of the fact that operations by duPont within its understanding with Sylvania carried out and consummated the threefold purpose attendant upon execution of the cross-licensing agreement and its amendments.

Our contentions hereunder are found at paragraph 108 of the trial brief and it begins a new heading in the index, III 5 b.

It often happens within the internal operations of a patent pool, either because of the number of the participants or their relative size, or for some other reason, that no single member completely dominates all the rest. When that circumstance is present, there must, perforce, be a certain amount of give and take resulting from some equality of treatment upon the participants. However, in the moistureproof cellophane relationship we have seen that duPont outranked Sylvania by a wide margin, judged according to relative resources, entrenched business position, number and location of plants, production and sales, or any of the other general indicia of commercial power.

5768 In other words, Sylvania at the inauguration of this relationship and for many years thereafter was a new, a relatively small, independent business organization participating in a venture with one of the nation's vastest concentration of economic power.

Against such a background of cooperative effort by two manufacturers comprising the entire industry in a vastly disproportionate commercial influence, it should not be surprising if the Government's evidence established that duPont imposed upon the weaker Sylvania.

We are not contending here that Sylvania was an unwilling relation in this community effort. On the contrary, the documents are considered to establish that it entered this kinship willingly, willing to accept any terms in exchange for protection against outsiders from its more powerful ally.

The Government submits that the exhibits about to be introduced will establish the effectuation of a group of restraints imposed upon the Sylvania Corporation, including, among others, the following: One, quotas impressed upon its production and sales; two, grants back of patents based upon inventions not conceived at the time of the agreement; three, relinquishment of the right to challenge inventions owned by the only other manufacturer in its field; four, the assumption of a burden of enormous royalties for a period that could possibly exceed thirty years; five, submission to quarterly reports whereby duPont became possessed of statistical information of a type normally secret, and which information embraced the entire
5769 industry.

To support our contention that by this agreement duPont and Sylvania contracted to restrain competition between themselves, the Government offers in evidence the following documents: Government Exhibit 2550, page 3354; Government Exhibit 2551, page 3355; Government Exhibit 2577, page 3396; Government Exhibit 2576, page 3395; and Government Exhibit 2575, page 3394.

(Letter from L. L. Stout to J. E. Hatt, dated April 28, 1942, was received in evidence and marked "Government's Exhibit No. 2550.")

(Letter from L. L. Stout to C. F. Daley, dated May 7, 1942, was received in evidence and marked "Government's Exhibit No. 2551.")

(License agreement between E. I. duPont de Nemours & Company and Sylvania Industrial Corporation was received in evidence and marked "Government's Exhibit No. 2577.")

(Letter from Mr. E. Right to Mr. Daley, dated June 23, 1942, was received in evidence and marked "Government's Exhibit No. 2576.")

(Letter from Mr. Daley to Dr. Wade, dated June 29, 1942, was received in evidence and marked "Government's Exhibit No. 2575.")

5770 Mr. MINICUS. These exhibits, if your Honor please, illustrate certain automatic procedures followed within the Du

Pont Company whereby licenses reading on moistureproof cellophane were automatically granted to Sylvania under the agreement of April 26, 1933. In other words, these documents are simply put into evidence to illustrate the method by which these rights were exchanged. These documents show that the following order was followed:

The patent service of the Du Pont Company would notify Mr. J. E. Hatt, the Manager of the Cellophane Division, that the patent had issued. Then the patent service would request Mr. Charles F. Daley, patent attorney, to prepare a license to Sylvania under the patent. Then the Rayon Department management would determine the appropriate royalty bracket; in other words, whether it came within the 2% royalty or was one of those radical departures we were talking about the other day which came within the 4% royalty. Then a license in standard form was prepared and the mechanics of execution were automatically completed and the license was forwarded to Sylvania.

The Government offers in evidence Government Exhibit 2572 at page 3388, Government Exhibit 2573 at page 3390, Government Exhibit 2570 at page 3384, Government Exhibit 2574 at page 3392.

(The samples of standard form licenses exchanged between Du Pont and Sylvania were received in evidence and
5771 marked, "Government Exhibits 2572, 2573, 2570, and 2574," respectively.)

Mr. Minicus. These, your Honor, are simply samples of the standard form licenses exchanged between the parties pursuant to April 26, 1933. The first two illustrate the form and the use of it as employed in the Du Pont grants, and the other two illustrate the standard form used in the Sylvania grants.

The Government offers in evidence Government Exhibit 2568 at page 3372, Government Exhibit 2741 at page 3624, and Government Exhibit 2742 at page 3627.

(The paper headed "Du Pont Patents under which Sylvania is Licensed under the Moistureproofing Agreement of April 26, 1933" was received in evidence and marked, "Government Exhibit No. 2568.")

(Memorandum from J. A. M. to Dr. G. M. Karns dated May 1, 1944, was received in evidence and marked, "Government Exhibit No. 2741.")

(The letter from G. M. Karns to Dr. William B. Hyden, dated May 16, 1944, was received in evidence and marked, "Government Exhibit No. 2742.")

Mr. Minicus. It will be seen that Government's Exhibit 2568 is a listing first of Du Pont patents under which Sylvania is licensed under the moistureproofing agreement of April 26, 1933.

These patents are those that were exchanged through March 20, 1942—that is, under which rights were granted. The
5772 first column sets forth the number of the patent, and we see the so-called five basic patents leading the list, a short title of the patent, the date of the license, and the bracket of royalty, whether 2 or 4% that the particular patent came within, and then on the last page we also have a certain listing of patents which Sylvania licensed to Du Pont under the agreement.

As to the Sylvania patents licensed to Du Pont we see in Government Exhibit 2741 a little more current list as of May, 1944, and there are listed in some detail the various patents under which Du Pont was licensed by Sylvania in the field of moistureproof cellophane, and we can note, incidentally, that on this list there are twelve patents licensed by Sylvania to Du Pont rather than nine as mentioned by Mr. Gesell yesterday.

Mr. Gesell. There are only nine.

Mr. Minicus. Now, Government Exhibit 2742 is a reappraisal by Du Pont on May 16, 1944, of the utility to Du Pont of Sylvania's patents.

Now, you will recall yesterday, your Honor, that Mr. Gesell read off certain descriptions, perhaps the short title, of the patents under which Du Pont had received licenses to operate, and I thought that the implication there was pretty broadly that these Sylvania patents were not worth anything anyway. Du
5773 Pont took licenses under them, but they did not really mean anything.

It was also pointed out at another point that the licenses or the patents under which the relationship would continue beyond the termination date of the agreement which, I believe, was 1948, would only be those under which the party was operating at the termination date. Now, here we find ourselves in May 1944 beginning to approach that termination date, and what is Du Pont's attitude to these patents under which it is licensed? This is a letter from Mr. G. M. Karns to Dr. William Hyden, Cellophane Research Section, subject Sylvania Patents." "Reference: Letter, J. A. Mitchell to G. M. Karns, 5/1/44.

"Dr. Mitchell lists five patents in which we may be interested, in which case we must use them commercially when the agreement expires in October, 1948. It is Dr. Mitchell's expressed intention to review the subject annually, adding to the list other Sylvania patents as they issue.

"We should draw up a plan for these patents and other desirable ones, as they issue, for having them in commercial production when the agreement expires. If the advantages are not immediately evident commercial use can be allowed to approach

expiration date as nearly as possible. Some research will be required to get into commercial production and plans should be available for taking up the program when it is necessary to
5774 do so. I think it would be well for Dr. Mitchell to set down his ideas for such a plan."

Now, in reading that document, your Honor, I could not help wondering why if these patents would have commercial utility at the date of expiration so that Du Pont would want to be in commercial production under them at that date of expiration, why they did not have commercial utility four years prior to the date of expiration, and the only conclusion that I could logically come to under that was that Du Pont never intended during the period from 1933 to 1948 to operate under any patents it had ever acquired from Sylvania. Why didn't it intend to operate under them? Well, we see first that if they operate under any patents in the radical departure group they were subject to a 2% royalty. Well, when it is considered what a large quantity of cellophane Du Pont produced vis-a-vis Sylvania, put u Pont under a 2% royalty and the royalty balance would be going the other way. Then we have that restriction ranging from 80% down to 71%, and we know that Du Pont was making more than 71% of the total in those final years of the agreement. Supposing Du Pont had had to pay 20¢ a pound or 30% on any patents of Sylvania's that they were using? The figure would be astronomical.

I would like to briefly consider now——

Mr. Gesell. Before you turn to another subject I would like to comment.

Mr. Minicus. Certainly.

5775 Mr. Gesell. There are two inaccuracies I want to correct, your Honor, and that is all. Mr. Minicus reads Exhibit 2741 and says it shows there were twelve patents, whereas I said there were nine. If he reads it more carefully he will see some of the numbers are mentioned more than once and there are only nine, and his Exhibit No. 1 shows there are only nine, and his introduction of the answers to the interrogatories show there are only nine, and there were only nine.

Now, number two goes to the question of commercial use of the Sylvania nine patents, Exhibit 2742. We have it in evidence that none of those patents was ever commercially used while the agreement was in effect or after the agreement with the penalty royalties and other provisions that Mr. Minicus talks about was cancelled. The record shows that now. So the suggestion that these were not being used because of the royalty situation is hardly borne out when they were not used afterwards. Nor is it borne out when you look at the prior exhibit and see that a number of years were not subject to any royalty as appears on Exhibit 2568. And it is also significant that as the Government proof unfolds it will appear that Sylvania did not use these patents, although they were not subject to any royalty provisions with respect to the use of their own patents, and the inferences that are drawn——

Mr. Minicus. Your Honor, I seriously challenge that statement and there is no evidence in yet, so I don't think we
5776 should have any comment on that. I take direct issue
with the statement that Sylvania did not operate under their patents.

Mr. Gesell. He takes issue. I have made a statement to the Court.

Mr. Minicus. Without any evidence, I would like to have the record show that.

The Court. Proceed.

Mr. Gesell. So these patents were not of any consequence, your Honor. That is the only point I want to make.

Mr. Minicus. Now, the evidence heretofore has disclosed how Sylvania was to pay an additional royalty of 20¢ per pound or 30% of the net sales, whichever is greater, on all M. T. sold in excess of certain limiting percentages. The evidence to follow will illustrate that neither party ever thought of these provisions other than as restrictions upon the number of pounds Sylvania could sell in any given year.

The Government offers in evidence Government Exhibit 170 at page 497. This is a table of the Sylvania-duPont relationship in moistureproof cellulose film beginning in the year 1933 and running down to the year 1943. The last year in which these percentages were operative, 1944, is not shown on this chart. It is not available to us in this form.

Mr. Gesell. May I look at the exhibit a moment?

Mr. Minicus. Certainly, sir. You have a copy of it. Now——

5777 Mr. Gesell. I asked for a moment to look at it, please, your Honor.

Mr. Minicus. This document was on a list sent to the defendant two weeks ago, your Honor.

Mr. Gesell. No objection.

(The paper headed "Sylvania vs. duPont Moistureproof Cellulose Film" was received in evidence and marked, "Government Exhibit No. 170.")

Mr. Minicus. The first column in this document shows the years running from 1933 through 1943. The next column shows the Sylvania sales in pounds.

Now, it will be noted that the Sylvania sales in pounds here are less than Sylvania's sales shown on the Government's tabular exhibits earlier introduced through Mr. Cook. The figure is only slightly less. It must be remembered that there was a small unit, a very small unit of Sylvania sales which were not subject to royalty under the agreement, those that were exported beyond the United States. Therefore we find Sylvania's sales figures a little lower in here than will be found on the Government table.

Then on the next column we find "duPont M. T. Sales (Pounds) including Cigarettes (as per agreement)"; and in the final column, "Sylvania Percent of Combined Sales of duPont and Sylvania (as per agreement)."

5778 Thus in the year 1933, which was the first year of the agreement—the agreement was signed in April of that year—we find that Sylvania did sell 12.7% of the total, and in that year we will recall that they were permitted to sell up to 20% of the total before the exorbitant royalties came into effect. So that year they were considerably below it.

5779 Then we see in the year 1934 that Sylvania has moved up to 17.6 percent and their allowance that year——

Mr. GESELL. It is .4 per cent.

Mr. MINICUS. 17.4 per cent, and their allowance that year was 21 percent.

The next year, 1935, they had moved up to 20.4 per cent, and their allowance was 22 per cent.

Then they continue along running 21.2, 20.6, 22.8, 21.2, 20.6, 20.6, 24.8, and 22.5, as the allowance goes up each year.

Now, it will be noted that the spread after the year 1936 increases somewhat. In 1936 it is fairly close and then as it goes up Sylvania holds its own. In 1942 Sylvania sold 24.6 of the total and they were allowed that year 29 per cent.

Now, we have explained why we consider that Sylvania could not approach too closely this upper limit with matters of manufacturing and other things coming into that, and we think the documents will disclose another reason why Sylvania did not run along closer to this alloted amount.

The Government offers in evidence Government Exhibit 2827 at page 6095. This is a letter from Mr. Pralatowski to Mr. Hatt dated May 27, 1935.

(Letter from Mr. Pralatowski to Mr. Hatt dated May 27, 1935, was received in evidence and marked "Government's Exhibit No. 2827.")

5780 Mr. MINICUS. This exhibit simply discloses in those early days of this relationship duPont's policy of taking licenses under all of the Sylvania patents in issue within the scope of the relationship.

Reading from the second paragraph:

"We see that Dr. Wallach's letter to you of May 8 classifies this patent the same way as we classify it in our letter to you of May 6. I think we should adopt the policy of taking licenses under all of these Sylvania patents as they issue because it is difficult for us to tell what we may wish to do in the next 17 years and if we do not exercise our right to take a license within three months, we lose our right to do so. Accordingly, I recommend that you write to Dr. Wallach in response to his letter of May 8, and indicate that you desire to take a license under this patent."

The next document the Government offers in evidence is 2639 at page 3462.

(Letter from Mr. Hatt to Mr. May dated November 20, 1935, was received in evidence and marked "Government's Exhibit No. 2639.")

Mr. MINICUS. This is a letter from Mr. Hatt to B. M. May. The early paragraphs of the letter disclose that Mr. Hatt and Dr. Wallach had had some conversations together and there was some question about the amount of the Sylvania royalty that had been
paid. Then at the final paragraph the statement begins,
5781 "These figures in turn compare with the nine month's
sales in 1934 on the part of Sylvania of 3,984,517 pounds against 19,431,116 pounds for ourselves which shows Sylvania percentage to be 17% for that period as against the current figure of 19.1%.

"Therefore, Sylvania's increase in tonnage for the 9 months' period is 1,200,000 pounds or at the rate of 30% whereas Du Pont increase is 2,600,000 or at the rate of 14%."

In other words, Sylvania is beginning to move up pretty close to this alloted line.

Then the statement follows:

"The Doctor was interested in checking up on these percentages the other day, inasmuch as the last quarter—which figured at the rate of 21.4% for the quarter—is getting rather close to his maximum permitted percent for the calendar year 1935 (which is 22%) and in discussing this he remarked it did not seem advisable to provide for further production when there was no possibility of selling it profitably. I am not certain in my own mind as to just whether he meant to convey he was giving some consideration to increased production or whether he just passed that out as a passing comment."

I submit, your Honor, that there we have a very real problem that was pointed up by the Government counsel earlier, that after

a while you are going to get to a point in this thing where, as Dr. Wallach realized here, if he puts in one more spinning machine, or casting machine, it is going to carry him way over
5782 the quota, so Dr. Wallach says, "Look, I am up close to the
quota now. What is the use of my putting in any more machinery?"

The COURT. Ten minute recess.

(At this point a brief recess was taken.)

Mr. MINICUS. The Government offers in evidence Government Exhibit 2681 at page 3515. This is a letter from J. E. Hatt to Dr. Roger N. Wallach, President of Sylvania Corporation, dated January 28, 1936.

Government's Exhibit 2681

(Letter from Mr. Hatt to Dr. Wallach dated January 28, 1936, was received in evidence and marked "Government's Exhibit No. 2681.")

Mr. MINICUS. It reads:

"DEAR DR. WALLACH: In accordance with my promise to you the other day, this is to advise that our moistureproof sales for the fourth quarter of 1935 in the territory comparable with your own were 7,216,483 pounds and which calculates that 24 per cent of our joint sales were by yourselves.

"This brings your total percentage of the joint sales for the year to date to 20.4 per cent, which is the figure I believe you mentioned here.

"Congratulations on your increased proportion."

Now, Sylvania's quota, your Honor will recall, for the year 1935 before imposition of these additional royalties was 22 per cent, hence in the final quarter these sales were at a
5783 rate in excess of the allowance for the next year. In other
words, for the last three months of 1935 when Sylvania was selling 24 per cent of the combined sales, they were 1 per cent above what they would have been allowed for the next year.

Mr. GESELL. Well now, that is just not so, your Honor. That assumes that Du Pont does not sell any cellophane.

The COURT. For that year?

Mr. GESELL. For the next year, any greater than they sold the year before.

Mr. MINICUS. I don't think Mr. Gesell understood what I said, your Honor. I will try it again. I said for the last three months of 1935—as Mr. Hatt says here, "24 per cent of our joint sales were by yourselves," that is, for the months of October, November and December of 1935 24 per cent of the combined sales were made by Sylvania. Now, Sylvania's quota for 1936, the following year. was 23 per cent. So for the last three months of the previous year they were selling at a rate 1 per cent higher than their quota for the next year.

Mr. GESELL. I can't see where that is so.

Mr. MINICUS. If they were selling at 24 per cent for the last three months of the previous year and their quota for the next year was 23 per cent, it is quite obvious that they were operating at a rate of 1 per cent, for the three months of the previous year, higher than what they would have been allowed for the next 5784 year. I don't say that it happened that way. I say that was the rate of production in the Sylvania Company for the last three months of 1935. They were operating at 24 per cent of combined sales and the arangement was that they should not exceed 24 per cent, or they could not sell up to 24 per cent until the year 1937. So the rate is certainly ahead of their regular rate.

I draw your Honor's attention to the fact that the previous document that I read, 2639, that it was in November of 1935, the last quarter of 1935, or the time in which Sylvania was selling at this rate of 24 per cent that it did not seem advisable to provide for further production when there was no possibility of selling it profitably, and that was at the same time—that all happened in 1935.

This document, 2681, that I have just read, illustrates very clearly, I think, how both parties were conscious at all times of these percentages and how closely they were watching them and notifying each other just where the other one stood at the time.

The Government offers in evidence Government Exhibit 2641, at page 3466. This is a letter from Mr. C. M. Albright to Mr. J. E. Hatt, dated August 11, 1937.

(Letter from Mr. Albright to Mr. Hatt dated August 11, 1937, was received in evidence and marked "Government's Exhibit No. 2641.")

Mr. MINICUS. The question has arisen at this time 5785 whether it would be advisable for Du Pont to make an audit according to the agreement of Sylvania's sales to see that the royalty reports, the quarterly reports they were receiving, were accurate, and Mr. Albright says in the fourth paragraph, "The royalties, as you know, are very substantial and the whole question, of course, reserves itself to be a policy question as to whether any ill-will which might result from such an audit might more than offset the advantages which accrue to us if we can continue to go along with them on a friendly competitive basis."

The purpose of these documents is simply to show the background in which this agreement was operating.

That is answered in Government Exhibit 2640, letter from Mr. Hatt to Mr. Albright dated August 13, 1937. The Government offers 2640 in evidence.

(Letter from Mr. Hatt to Mr. Albright dated August 13, 1937, was received in evidence and marked "Government's Exhibit No. 2640.")

Mr. Minicus. The last paragraph on the first page reads:

"We believe that from a point of view of cooperation and friendly competitive basis that we are justified in accepting the present returns without an audit. It may well be that this subject will be up for further discussion in other directions sometime this fall after Dr. Wallach returns to America, because the Legal
Department has raised some question about one of the
5786 paragraphs in the original contract. We dislike very
much to open discussion of this for the reason that this would probably lead to suggestion of other changes in the contract on the part of Sylvania. Some of these suggestions might be undesirable from our point of view and for the moment at least, we are inclined to let the situation go on as it is."

5787 The Government offers in evidence Government Exhibit
2642 at page 3467; Government Exhibit 2647 at page 3476; Government Exhibit 2649 at page 3478; Government Exhibit 2579 at page 3400; Government Exhibit 2658 at page 3484; Government Exhibit 2660 at page 3486; Government Exhibit 2669 at page 3497; Government Exhibit 2581 at page 3507; and Government Exhibit 2583 at page 3509.

The Court. What significance do you give to Government Exhibit 2640? There the tone of that exhibit is that they seem to have some fear of their competitor. It does not sound as if they were friendly conspirators.

Mr. Minicus. I don't think that is exactly it, your Honor.

The Court. What is it?

Mr. Minicus. If you will recall that at that time the evidence has shown heretofore that in 1937 and 1938 Mr. Gregg had called attention to the mutual consent clause and had recommended that the mutual consent clause in the agreement of April 26, 1933 be altered, and the Government pointed out at that time that the Cellophane Management did not want to open up the entire negotiations by changing the agreement of April 26, 1933, that they would prefer to have the agreement stand as it was executed in
1933. They felt that if they opened up the conversation, as they
say in this letter, that Sylvania would want to have some
5788 changes. What those changes were we don't know. Our
evidence does not illustrate. They had a fear of some

changes that Sylvania might ask for in the agreement, and you might further recall, your Honor, then that nothing was done about Mr. Gregg's proposal, and it was almost a year before they got around to the amendatory agreement.

Now, this occurs at the same time—and you will note the first statement of that paragraph, the fact of cooperation and friendly competitive basis is stressed, and they want to maintain it. They say that the conversation may come up—that the discussion may come up in the Fall when Dr. Wallach returns. They say they dislike to open this discussion for the reasons we have just talked about; that they would prefer to have the contract remain as it was executed in 1936; and their only fear was in changing—or the only anticipation they had, or whatever it was, was in changing the terms of that contract of April 26, 1933 which the Cellophane Management definitely did not want to do. That was the change whereby this non-exclusive license requiring mutual consent was changed—the wording was changed to an exclusive license, and that is the only worry they had there. I think the spirit of cooperation pervading the entire relationship is expressed in the first sentence of the exhibit that I read, the exhibits that have just been introduced.

Mr. Gesell. There is just one point I want to make about the present offer. This is a series of royalty reports. 5789 It seems to me if they are pertinent at all—and I find it difficult to see their relevance—they ought to be complete and we should carry these figures on so we have the 1944 and 1945 figures in, so that the Court will have the full picture of the royalty operations under this agreement, not cutting it off for a period before the completion of the agreement.

Mr. Minicus. These exhibits, your Honor, are not offered to show the fact of the amount of the royalties at all. We have another exhibit coming along that will take care of that. These exhibits are only offered for the purpose of illustrating certain statements contained therein that we believe are probative of how Du Pont felt these quotas, the light in which they considered the quotas, whether they were really a royalty arrangement or whether they were a restriction on Sylvania's production. That is the only reason for offering these exhibits.

Mr. Gesell. Do I understand the Government will put in the royalties for the whole period?

Mr. Minicus. Most certainly.

Mr. Gesell. Very well.

(The series of royalty reports referred to were received in evidence and marked, "Government Exhibits Nos. 2642, 2647, 2649, 2579, 2658, 2660, 2669, 2581, and 2583," respectively.)

Mr. MINICUS. As I have just explained, we believe
5790 that the expressions contained in these documents show Du
Pont's state of mind concerning the enhanced royalty rate operating upon Sylvania's sales in excess of stated amounts. You will notice in the reading of these documents—and I am not going to read them in toto—but in each one of these documents there is a statement of the nature that I am about to illustrate. The documents speak of the limitations on Sylvania's sales of moistureproof in terms of "Entitled to 25%," "Royalty Penalty, Increased in 1942 to 29% and Continues at that Level," "27% Allowable Before Penalty."

The COURT. Do the parties recognize that as penalty?

Mr. MINICUS. Not in the agreement, your Honor.

The COURT. Are you reading or are you just interpreting?

Mr. MINICUS. These are statements, quotes, that are taken right out of them.

The COURT. I want to know whether the parties regard them as penalty payments.

Mr. MINICUS. That is what we believe these documents show. They use the term "Penalty."

The COURT. They do?

Mr. MINICUS. Yes.

The COURT. Read me an illustration of that.

Mr. MINICUS. Government Exhibit 2647, the last sentence in the exhibit:

5791 "Under their license they are entitled to 26% this year if they can secure it without royalty penalty."

A handwritten note appearing on Government Exhibit 2579 with the initial H under it, which was similar to those with Mr. Hatt's initials:

"27% allowable to Sylvania for 1940 before penalty."

The last sentence on 2658, "Their proportion of the total sales without the penalty for the year to which they might be entitled is 27%."

Again on Government Exhibit 2581: "This results in a percentage to Sylvania of total 1941 business of 20.6%, which is the same as their percentage in 1940 of 20.6%. During the year 1941 they are entitled to a total percentage of 28% of the total sales without penalty of added royalty."

Other statements that we have found in here that indicate that they thought of this as quotas rather than as a threshold at which a new royalty, a legitimate royalty, began is the statement "Permissible percentage," and again "29% is the maximum percentage to which they are entitled."

Mr. GESELL. Have you finished—

Mr. Minicus. This is all under the operations.

Mr. Gesell. Have you finished the discussion of the royalties?

Mr. Minicus. I have finished the discussion of the royalty, yes, sir.

5792 Mr. Gesell. I would like to comment.

Your Honor has seen the emphasis which the Government places upon the fact that in a conversation with Mr. Hatt at the end of the year in 1935 Mr. Wallach made some reference to the effect of this agreement on his production. I think it is rather pertinent to consider what happened the following year to determine whether or not there was a restriction on Sylvania's production, in fact, operating. This evidence shows that in the next year their sales went up from 7,517,000 pounds to 9,973,000 pounds.

Exhibit 410 in evidence at page 5595 shows that their potential——

Mr. Minicus. Objection, your Honor. Exhibit 410 does not show the amount of sales of Sylvania that was subject to the royalty. As Mr. Gesell has——

Mr. Gesell. I haven't even mentioned sales from that exhibit. If Mr. Minicus will sit down and let me talk a minute, Exhibit 410 at page 5595.

The Court. Read Mr. Gesell's last sentence.

(The following was read by the Reporter:)

"Exhibit 410 in evidence at page 5595 shows that their potential"——

Mr. Gesell. (Continuing.) Shows that their potential capacity, page 5595, jumped from 15,300,000 pounds in 1935 to 20,000,000 pounds in 1936. It is not indicating restriction
5793 on production. It shows that their casting machines in the same exhibit increased from 15 to 17.

Now, the thing that the Government constantly overlooks is that the real operation of this formula which we went through yesterday at such length is not yet understood by the Government, because it is always presented to the Court in terms of there being some kind of a fixed quota, a term that the Government likes, but it is not a term that applies to this formula at all.

Now let us look at what these figures really show about the effect of this extra royalty or penalty, royalty or whatever you want to call it, upon Sylvania's sales:

In 1933 they could have made 1,637,000 pounds more than they made before that royalty became operative, or 71% more than their actual sales.

5794 In 1934 they could have made 1,432,000 pounds and sold them in excess of what they sold without the royalty coming into effect, or 26.5 per cent, your Honor, more than their actual sales.

In 1935 they came the nearest to the point. They could have sold 735,000 pounds more in 1935 than they sold, or 9.8 per cent above their actual sales, and we are talking only about their domestic sales here, your Honor, because there was no limitation on their exports.

Look how the percentages run. They could have sold 10.9 per cent the next year; 21.8 per cent the next year; 12.7 per cent the next year; 30.6 per cent the next year; 42.5 per cent the next year; 50 per cent more than they did in 1941; 24.5 per cent in '42; and 40.6 per cent in '43—or a total of over 45 million additional pounds of moistureproof cellophane could have been made and sold by Sylvania for use in the United States under the terms of this agreement without bringing into effect the extra royalty at all.

The Government has tramped back and forth through Viscose and Sylvania's files and personnel, and you will find that no witness appears on this stand who will testify that this royalty impeded Sylvania's growth or production whatsoever. What was happening was that Du Pont was expanding and expanding and expanding its sales, opening new and bigger markets and every time that was done the whole amount available to Syl-
5795 vania grew so fast and so large that these percentages were percentages that they never could reach. In this entire period under review, your Honor, the average sales by Sylvania could have been one-third more than they were without bringing that royalty into effect.

The Court. And that was because—and I am now testing whether I understood the blackboard discussion yesterday—that was because the formula was based on combined sales?

Mr. Gesell. Precisely, your Honor. And I took, if your Honor will recall, for illustration the figures comparable to '35, which is the worst year of this whole picture and naturally, therefore, the one on which the Government puts its emphasis, and we saw there that their increase could have gone to 10,000,000 pounds, and that if that had happened instead of 7,500,000 pounds the additional royalty would have meant 2.4 cents per pound at a time when the records show in this case that Du Pont's margin of profit on its sales was 14 cents.

Now, if this formula impeded, when we see these figures of sales that Sylvania could have made and didn't make, won't there be some witness, won't there be someone who comes forward and says it, or does Mr. Hatt, who is now deceased, stand as the witness for a statement made to him casually at the end of 1930 by

which we would suffer by an adverse decision, we believe it is worth while. Additionally, we feel that settlement at the present time will be advantageous to our opponents and quite disadvantageous to us. If a settlement is reached at this time, it will undoubtedly involve an extension of certain licenses to the other parties of the Interference in return for a concession of priority. All of the parties are undoubtedly anxious to use vinyl resins and to extend licenses under the claims of this application would amount to the same thing as setting these people up in business with a moistureproofing composition comprising a vinyl resin and a wax. Carbide & Carbon would doubtless be delighted to use such a composition on a glycol cellulose base while Eastman would welcome an opportunity to use freely such compositions on cellulose acetate bases. In order to extend to them
5832 licenses under this application, we would undoubtedly have to furnish them with licenses under the broad claims of any other patents we may have which would dominate the claims in the instant case. This might be a highly undesirable thing from our point of view. The only disadvantage of not settling insofar as we are concerned, seems to us to be the possibility of losing the priority of the invention to the extent of vinyl resin moistureproofing compositions containing a wax compatible with the vinyl resin. As indicated above, we do not consider this loss to be very serious."

Moving on to the last paragraph:

"We have refrained from a specific recommendation and we leave the course of action to you and Mr. Pritchard. We think that it might be wise to entertain the opposition's ideas for settlement with the hope of finding out more about their position. With the information available to us, we would not favor settlement except under conditions which would be highly advantageous to us."

The Government now moves into evidence Government Exhibit 2337, which is a letter from Mr. William S. Pritchard, I believe, to Mr. E. P. Boynton. However, counsel representing Hazel-Atlas and Sylvania also received copies of this letter. This letter is dated March 11, 1935, and the subject is "Interference No. 69,624 (vinyl resin)".

(The letter from William S. Pritchard to E. P. Boynton dated March 11, 1935, was received in evidence and marked,
5833 "Government Exhibit No. 2337.")

Mr. McAuliffe. (Reading.)

"Dear Sirs:

"I have your letter of March 7, 1935 suggesting a conference on Wednesday, March 20th, in connection with further discussion of settling the above-entitled interference.

Dr. Wallach, who is now deceased, when that statement itself shows that Mr. Hatt wasn't sure whether Dr. Wallach was intending to put in new production or not. If this company was held back by this formula, there must be some 5796 probative evidence, and there cannot be in the face of these overwhelming statistics of the sales available to them that they didn't make.

I have made the computations, your Honor, so that the record will be clear, from Exhibit 170, which was the exhibit introduced in evidence this morning by Mr. Minicus.

Of course it is also very interesting to watch these figures and see that even after the agreement was cancelled out, Sylvania's sales did not spurt upwards in percentage, and if the agreement had been carried on into a later period and you compare them with the actual sales that Sylvania made after the agreement was cancelled out, you still see that they weren't able to sell enough to get up to their percentages.

I think that's all the comments I have, your Honor.

Mr. Minicus. Now, as to this evidence, your Honor, the conversation between Mr. Hatt and Mr. Wallach, who were both the chiefs of their respective operations, and who unfortunately today are deceased so the Government cannot produce them, I submit that their evidence co-temporaneous with the happening by people in authority is a great deal more weighty than the pontifications of Mr. Gesell.

We have here Mr. Wallach's statement, and the evidence shows that Mr. Wallach was the man with the final word of authority in the Sylvania Company, that he was running so close then that he couldn't see any use in putting in any additional 5797 productive facilities. Mr. Gesell has attempted to rebut all this by saying, "Look at the next year. In the next year they jumped away up. So they must have put in additional productive facilities after Mr. Wallach made this statement." I will remind the Court at this time of Mr. Gesell's statement that it took almost two years to increase the productive facilities of its cellophane plant——

The Court. Eighteen months.

Mr. Minicus. Eighteen months—I am sorry.

Mr. Gesell. That was a new plant and had nothing to do with increasing capacity, as the Court is quite aware.

Mr. Minicus. This statement is made at the end of the preceding year. Certainly that increased production was on the way then. The parties must have been talking about that increased production. The question is whether they would go beyond that. If Mr. Gesell insists that we look eighteen months into the future on these expansions, we have got to do it on both sides.

"My client does not desire to settle the above-entitled interference on the terms which were proposed at the first conference. The Du Pont Cellophane Company, Inc. as a matter of policy in this instance does not desire to enter into any agreements whereby others would secure the right to manufacture a wrapping tissue competitive to that which it is making and selling. It has no objections to entering into an agreement which will permit the other parties to make materials other than wrapping tissues.

"In view of the above, I do not believe that my attendance at the proposed meeting on March 20th is necessary. If, however, you desire to entertain my proposals or desire my presence for any reason whatsoever, please advise me and I will be present."

The Government now moves into evidence Government Exhibit No. 2851, which is a letter from J. G. Davidson, Vice-President of Carbide and Carbon Chemical Corporation to Mr. L. A. Yerkes, dated December 12, 1935.

(The letter from J. G. Davidson to L. A. Yerkes
5834 dated December 12, 1935, was received in evidence and
marked, "Government Exhibit No. 2851.")

Mr. McAuliffe. (Reading.)

"Dear Mr. Yerkes:

"With further reference to the actions pending in the Exchequer Court of Canada, involving a conflict between our Canadian application No. 399,628 and your Canadian application No. 378,450, and your impeachment suit against our Canadian patent 348,830, and also with reference to Interference No. 69,624 in the United States, to which interference there are at present four parties, namely, DuPont Cellophane Co., Hazel-Atlas Glass Company, Carbide and Carbon Chemicals Corporation, and Sylvania Industrial Corporation, I note that your attorneys under date of March 11, 1935 made the following statement in connection with a possible settlement of the United States interference:

"'The DuPont Cellophane Company, Inc. as a matter of policy in this instance does not desire to enter into any agreements whereby others would secure the right to manufacture a wrapping tissue competitive to that which it is making and selling. It has no objections to entering into an agreement which will permit the other parties to make materials other than wrapping tissues.'

"So far as we are concerned we are willing to receive restricted
rights under the three controversies mentioned above,
5835 which will permit ourselves and purchasers of our material
to make and use materials 'other than wrapping tissues'.
If this presents a solution to your people, I will be glad to have our patent attorneys get together with yours and find some way out of the matter before too much additional money has been spent."

Mr. Gesell. Well, they did the next year, too. You will see they expanded every year.

Mr. Minicus. But never once did they have enough there to exceed their quota.

The Court. Well, you are both agreed on that point.

Mr. Gesell. No, your Honor.

The Court. Aren't you agreed with him on that, that they were never able to produce sufficiently——

5798 **Mr. Gesell.** I say they were never able to sell enough. This ran on sales. I have not said anything with respect to what they might have done if they had been able to find somebody who would buy from them. I think if they had gotten out and done some creative selling they would have sold more, but what they were doing was dragging along behind us and getting a free ride, or trying to. We were out opening the markets. This relates to sales, your Honor, this formula. You will find in some cases they had capacity but did not undertake to sell what they could have produced. And that was because they couldn't find somebody to sell it to.

The Court. Well, tell me this, Mr. Minicus. What evidence will I refer to to determine their potential productive capacity in relation to these percentage figures as to sales?

Mr. Minicus. Why, their potential productive capacity is already in evidence according to the charts we submitted, your Honor. The basic evidence on that is in Exhibit 410.

The Court. Suppose I ask myself this question: I want to know, for example, in the year 1940 if they had a productive capacity to reach 27 per cent of the combined sales of both duPont and Sylvania. Will there be material for me to examine that?

Mr. Minicus. Yes, sir; the chart will show that and also Government Exhibit 410.

Mr. Gesell. Page 5595.

5799 **Mr. Minicus.** I would like to point out in the light of Mr. Gesell's statement that of course Mr. Gesell would have had the Sylvania people out with such a strong sales force that they would have sold so much cellophane they would have sold it out of business because they were selling at a loss once they got over 29 per cent. That fact is irrefutable. They were stopped at 29 per cent whether they ever made it or not. That we cannot get away from.

Mr. Gesell. That is not so, your Honor. We have no proof as to their costs; we have no proof as to whether it would have been at a loss or not. All we have is that their witness, Mr. Cook, knows their costs but does not come forward and testify about them. Your Honor can draw your own inferences as to why he didn't.

Mr. Minicus. We don't have to go into costs or anything else about this matter, your Honor. I submit this kind of quotarizing is a regulation of the competition between the two parties to the agreement.

The Court. Are you going to start on some new exhibits?

Mr. Minicus. Yes.

The Court. I think we will take our luncheon recess at this point.

(At this point a recess was taken until 2:15 o'clock p. m., of this same day.)

5800 2:15 O'clock, P. M. the Same Day.

Present: As before noted.

Mr. Gesell. My associates pointed out to me during the noon recess that I made a misstatement to the Court in my argument this morning, which I wish to correct. I said that there would be no evidence coming along as to Sylvania's use of any of the nine patents that were licensed to Du Pont under the agreement. My attention was called to the fact that there is an exhibit which may be offered which does show that some of those were used by Sylvania, and I wish to correct my statement in that regard.

The Court. Give me a moment to correct my notes. Proceed, Mr. Minicus.

Mr. Minicus. Documents to follow, your Honor, are offered in evidence to show that in addition to quotarizing Sylvania's sales and thereby restraining competition between the only two manufacturers in the industry, Du Pont did in collaboration with one of the co-conspirators attempt to suppress Sylvania's exports into Canada.

Government Exhibit 1171, appearing at page 3594 of the bound reports is offered in evidence.

(The letter from J. E. Hatt to Mr. W. G. Cuttle, Canadian 5801 Industries Limited, dated August 30, 1935, was received in evidence and marked, "Government Exhibit No. 1171.")

* * * * *

5805 We also note that duPont says, "We may have to litigate these patents in Canada some day." The patents were never litigated in Canada, and in 1944 C. I. L. licensed the Sylvania Company under the moistureproof patents in Canada. That was nine years after this letter.

Turning now to a consideration of the subject of the Sylvania royalties. Again the Government is not attacking the imposition of royalties upon a licensee, but in a question involving monopoly power and the position of a defendant such as this one in the industry, the Courts have in the past considered this royalty problem. Judge Knox observed in his recent opinion in United

States against the Aluminum Company of America, that from a competitive standpoint royalties received by a monopolizing defendant from others engaged in the industry have a double import, that is, royalty receipts constitute revenue to the monopolist which in turn are cost items to the competitor. The Court did not pursue the point further because, as he said there, the amounts in that case were trifling and the income received by Alcoa only served to offset its expense items that it itself paid in royalty payments. So Judge Knox thought that in that particular case the royalty payments accruing to Alcoa did not in any sense enhance its power.

Such is not the case here. We have never found any record of royalty payments by the duPont Company under any
5806 patents involving cellophane. Furthermore, considering the size of the other corporations involved in this industry, the sums we do not consider to be trifling.

The Government offers in evidence first Government Exhibit 2743 at page 3628.

(Unsigned memorandum to Mr. Yerkes and Mr. Keller entitled "Sylvania Agreement," dated November 20, 1944, was received in evidence and marked "Government's Exhibit No. 2743.")

Mr. Minicus. It is not necessary to read this entire exhibit but we will see that as of November 20, 1944, the date of this correspondence to Mr. Yerkes and Mr. Keller, that in the final paragraph is the statement that Sylvania has paid a total of $1,415,470 in royalties under the moistureproof patent up until that time. That was just under the two and four per cent royalty provisions.

Now, Government Exhibit 499, previously introduced into evidence, reveals that for the full year of 1944—the previous document was a report in November, 1944—for the full year of 1944 Sylvania paid to duPont in royalties $212,627.58.

In 1945, Government Exhibit 500 discloses that in that year Sylvania paid $142,910.40.

Government Exhibit 501 shows that for the year 1946 these royalty payments were $160,891.02.

Likewise Government Exhibit 501 for the year 1947 shows that Sylvania paid $168,693.

5807 That means that during the term of this royalty agreement down to the date of the filing of the complaint, the Sylvania Company paid the duPont Company approximately $2,000,000 for the right to operate under these licenses.

5808 The Government is about to offer in a relatively lengthy list of documents. We will just offer them in evidence by notation of the Government Exhibit No. These documents are only designed to show the four-stage procedure accompanying submittal by Sylvania of its royalty statements—in other words, just what the procedure was in the royalty statements. The documents break down into groups of fours, and I believe there are about four sets of these shown just to show the regularity with which this process was gone through.

The Government offers in evidence Government Exhibit 2593, Government Exhibit 2592, Government Exhibit 2596, and Government Exhibit 2594. That would be the first group of documents, the first group of four.

(The papers referred to showing procedure accompanying submittal by Sylvania of its royalty statements were received in evidence and marked, "Government Exhibits Nos. 2593, 2592, 2596, and 2594," respectively.)

Mr. MINICUS. The Government offers in evidence Government Exhibit 2599, 2597, 2598, and 2600. That is the second group of four.

(The papers referred to showing procedure accompanying submittal by Sylvania of its royalty statements, were received in evidence and marked, "Government Exhibits Nos. 2599, 2597, 2598, and 2600," respectively.)

5809 Mr. MINICUS. The Government offers in evidence Government Exhibits 2602, 2601, 2603, and 2604. That is the next block of four.

(The papers referred to showing procedure accompanying submittal by Sylvania of its royalty statements, were received in evidence and marked, "Government Exhibits Nos. 2602, 2601, 2603, and 2604," respectively.)

Mr. MINICUS. The Government offers in evidence Government Exhibits 2606, 2605, 2608, and 2607.

(The papers referred to showing procedure accompanying submittal by Sylvania of its royalty statements, were received in evidence and marked, "Government Exhibits Nos. 2606, 2605, 2608, and 2607," respectively.)

Mr. MINICUS. The Government offers in evidence Government Exhibit 2610, 2609, 2612, and 2611. That is another block.

(The papers referred to showing procedure accompanying submittal by Sylvania of its royalty statements, were received in evidence and marked, "Government Exhibits Nos. 2610, 2609, 2612, and 2611," respectively.)

Mr. MINICUS. Then as a separate group the Government offers in evidence Government Exhibit 2631, 2636, and 2638.

(The papers referred to showing procedure accompanying submittal by Sylvania of its royalty statements, were received in evidence and marked, "Government Exhibits Nos. 2631, 2636, and 2638," respectively.)

5810 Mr. MINICUS. As I mentioned, these exhibits are designed to show the four-stage procedure accompanying submittal by Sylvania of its royalty statements, the quarterly statement provided for in the report.

The first document in each group of four to exemplify this—I speak of Government Exhibit 2593—illustrates the submission of the quarterly report statement by Sylvania. Therein is set forth a designation of the pounds sold for the quarter, a statement of the value of the pounds sold, the dollar value, and a statement of the royalty payment according to classification.

The next document in each block of four, in the first instance Government Exhibit 2592, contains certain comment on that quarterly report by the Du Pont Division Manager. There is there a comparison of Du Pont's against Sylvania moistureproof sales. Then there is always a reconciliation of Sylvania's sales with the allowable quota for the period. Third, there is a statement of Sylvania's royalty payments, and finally a computation of Sylvania's market position in the industry.

The third document in each of these blocks, in this case Government Exhibit 2596, is an analysis by the Du Pont Company of its own sales and their relationship to the Sylvania agreement.

The fourth and final document in each one of these groups, and the one I am illustrating is Government Exhibit 5811 2594, is a comparison by Du Pont of its moistureproof sales in relation to those of Sylvania's. This is the most interesting document in each of the groups of four. On these documents you would usually find a computation of Sylvania's market position year by year. Secondly, we find the elements of market analysis that Du Pont is able to derive from these statements, particularly its ability to derive the average price from the percent—the average price and also the percent increase in Sylvania's sales.

The last column on that page—and this is the first quarter 1942—shows that they have been able to compute Sylvania's average price at 39.6, and then below that is a computation of Sylvania's average price for moistureproof for 1943; that is, Du Pont's is on the top part of the page and then Sylvania's average price is compared to it at the bottom part of the page. Thus in 1942 Du Pont's average price for the first quarter on moistureproof cellophane was 39.6, and for the same quarter Sylvania's was 39.4. I think I have explained in the past that these average prices do not carry through the identity of the quoted prices primarily for the reasons that each of the companies very often sold different quantities and qualities of the material.

Then at the bottom of the page are further computations derived from the royalty statements. The percent of increase 5812 of the business of both companies is noted as derived from this information contained, and it will be noted that the final item on each of these statements is that—and I quote, "Percent allowable under contract annual basis," and there we find in this year a percent allowable which is 29%.

Our purpose in showing that, your Honor, is to show that through these quarterly statements, in addition to knowing just how much royalty Du Pont was due under this agreement, they were also able to employ these royalty statements to get other market statistics which, of course, covered the entire industry because of the peculiar market structure here.

The next exhibit that we offer in evidence is Government Exhibit 2645 at page 3422 and shows the ultimate product of this analysis to which these royalty statements were subjected. This exhibit presents two aspects of this analysis: One, the derivation of certain statistical information from Sylvania's quarterly reports; and, two, because of the market structure of the industry—only two producers and sellers—the application of the information so derived to particular customer accounts.

Government Exhibit 2645, which is offered in evidence is a report from H. O. Ladd to O. F. Benz dated April 28, 1939. The first part of the report is concerned with a general analysis of the royalty statements under the subject "Sylvania Industrial Corporation First Quarter 1939."

5813 (The report dated from H. O. Ladd to O. F. Benz dated April 28, 1939, was received in evidence and marked, "Government Exhibit No. 2645.")

Mr. Minicus. (Reading.) "From the figures supplied by you covering Sylvania's moistureproof volume for the first quarter 1939, I make the following analysis:

"Sylvania sold 3,043,815 lbs of moistureproof sheeting in the first quarter of 1939 subject to royalty under our license agreement compared to 2,251,604 lbs in the first quarter of 1938, an increase of 522,211 lbs or 20.7%. Comparative Du Pont figures under the license agreement show we sold 11,586,898 lbs in the first quarter of 1939 against 9,838,962 lbs for the 1938 period, a gain of 1,747,936 lbs or 18.0%.

"Changes in relative position for the first quarters of 1938 and 1939 and the fourth quarter of 1938 follows:"

Thereunder is a table showing the relative positions of these two producers in the industry, and it will be noted the first quarter 1938 Sylvania had 20.4% and Du Pont had the other 79.6%, and the other relative participations are pointed out in like manner. I continue reading:

"The 20.8% attained by Sylvania in the first quarter 1939 is the largest proportion of total first quarter moistureproof volume attained by the competitor since his manufacture of coated sheeting. But the decline in his position as compared to the

5814 fourth quarter 1938 is the greatest relatively and in tonnage for the same periods (excepting only the abnormal 1937-36 first and fourth quarters when business conditions altered the ordinary seasonal factor in his sales). Comparatively Du Pont sales show the largest increase since 1933. Note the following figures:"

Thereunder is a table of increases or decreases, first quarter against fourth quarter for Sylvania and Du Pont.

I continue reading:

"The significance of the decline in position in Sylvania's first quarter 1939 sales compared to the fourth quarter 1938 is evident when the trend of the competitor's position is taken into account for 1938. Starting with 20.4% in the first quarter, his standing rose to 22.% in the second, 24% in the third, and held even at 24.0% for the fourth quarter. This was the highest ratio ever attained, previous high point being 22.5% reached in the second quarter 1936.

"The manner in which this gain in 1938 was accomplished through raiding tactics on large units of our business has been fully outlined in the Annual Competitive Report submitted February 9, 1939, and it was the carryover of these 1938 gains that enabled them to show a slightly better comparison for the first quarter vs first quarter.

"Sylvania's securing a gain of 4/10 of 1% more of the total moistureproof volume in the first quarter 1939 than in the comparative 1938 period represents a theoretical shift of
5815 but 85,000 lbs. Considering that this transition applies against tonnage close to 15 million pounds, spread over several thousand users in a wide diversification of industry, it is evident we can provide analysis only through a tremendous volume of detail.

"For this reason, we confine the following comment to rather broad considerations:

"Effect of Great A. & P. Tea Company Volume

"Having regained an estimated 85% of this account's business about the middle of December 1938, and having received from this customer approximately 375,000 lbs in the first quarter 1939, none of which was enjoyed in the first quarter 1938, it would seem we should have improved our relative first quarter position. A. & P. was an important factor, but it must be kept in mind we enjoyed 100% of General Baking Company's business in the first quarter of 1938, which has not been the case since last May. Despite the fact Du Pont volume with this account is reduced only about 68,000 lbs in the first quarter 1939, improved business probably has enabled Sylvania to secure a higher volume than our decrease

in sales. Also there can be little doubt Sylvania has been able to secure sizeable offsets to the A. & P. loss with Purity Bakeries whose purchases are off 38,000 lbs in direct sales, and approximately 14,000 lbs in indirect sales—the latter representing a
5816 shift to unconverted sheeting and indirectly to Sylvania's
benefit. Schulze Baking Company, whose first quarter purchases from us show an increase of 29,000 lbs, also represents one of the contributing factors in that it is estimated Sylvania secured approximately 50,000 lbs of business in the first quarter 1939 compared to none in early 1938.

"A survey of leading accounts in our various consuming industries shows there have been no major losses in moistureproof business that would materially affect first quarter comparisons other than those noted. In other words, Sylvania's slight improvement in standing results from business secured by the competitor in the second, third and fourth quarters of 1938 which have carried over into 1939. There are exceptions. For instance, Keebler Weyl, largely lost to Sylvania in February 1939 is estimated to be buying 23,000 lbs a quarter from the competitor. However, our own sales to Keebler Weyl in the first quarter 1938 amounted to but 2,000 lbs and it was not until the third quarter volume reached sizable proportions."

5817 I present that, your Honor, as an illustration of the
means by which duPont was able to effect quite a fund of information concerning the shifts of business to different accounts. It is quite obvious that this would not have been possible in an industry containing a sizable number of competitors. As a matter of fact, the Government itself will not issue information from which knowledge of this nature can be derived in an industry where there are only one or two or three industries so that one competitor in the industry can break it down in such manner as he will be aware of the entire industry. Bear in mind, your Honor, that this information, or information of like nature, was not flowing back to Sylvania. Only duPont had it.

The COURT. Who has the book of dramatis personae? I want to see who H. O. Ladd is.

Mr. GESELL. This is dated April, 1939, your Honor, if you want to match the position with the date.

The COURT. I just want to see about the author of the report.

Mr. MINICUS. Now, we submit that not the least of the advantages to be derived from having information of this nature available is that certain industry-wide knowledge not available to the competitor is acquired. In the second place, it is quite obvious from the analysis as applied to individual accounts that de-
5818 fendant in this case was able to ascertain where its sales
efforts and emphasis of its sales efforts could be best directed.

I will not read in detail the next exhibit which we offer. We offer Government Exhibit No. 2585 at page 3511.

(Memorandum from Mr. Hatt to Dr. DeRight dated July 29, 1942, was received in evidence and marked "Government's Exhibit No. 2585.")

Mr. Minicus. This time the report is from Mr. J. E. Hatt to Dr. R. E. DeRight, Special Assistant, Rayon Department. The final paragraphs say—and again the heading is under "Royalties Sylvania Industrial Corporation":

"We have therefore lost position in this first six months' period to the extent of 5% of that volume. During that period Sylvania total sales were increased 2,800,000 pounds and in the same period our volume shrank 1,000,000 pounds.

"These figures would indicate that 2,400,000 pounds of business has been secured by Sylvania in this 6 months' period at our expense. This is equivalent to 400,000 pounds per month.

"Further details will be supplied on this in relation to individual accounts as soon as the 6 months' analysis of business is complete."

I submit that in that final statement there is the indication that this analysis in application to individual accounts was quite a regular thing with the company.

5819 Virtually the same sort of information appears in the exhibit we are about to offer. We offer Government Exhibit 2587 at page 3516.

(Memorandum from Mr. Hatt to Mr. DeRight dated November 2, 1942, was received in evidence and marked "Government's Exhibit No. 2587.")

Mr. Minicus. The next to the last paragraph states: "Attention is called to the average price per pound received by Sylvania which for the quarter is increased almost three cents per pound over the previous quarter whereas the du Pont increase in average price is of the nature of one-half cent per pound. This reflects the billing of Sylvania of substantial quantity of Government special film at a higher price per pound whereas practically none of our production of this special Government film was billed during that period. Such billings will appear in October sales in our own records."

I think in there we already have an explanation for the reason for this variation in the average price.

The Court. What is the theory of this line of evidence? Heretofore the dominant note has been duPont vis-a-vis other competitors or lack of competitors. Now, if I interpret this evidence correctly, this is duPont vis-a-vis Sylvania, and in somehow taking undue advantage of them they are co-conspirators, is that it?

Mr. Minicus. I attempted to stress that in an earlier statement this morning, if your Honor please. This entire sec- 5820 tion all through here has been devoted to restraints upon Sylvania. I say that we are presenting this moistureproof pool in operation in two ways. The first is that the result of the pool was to suppress if not completely obliterate competition between duPont and Sylvania through the imposition of restraints upon Sylvania. Thus we maintain that Sylvania's sales of moistureproof were subject to a quota which they could not exceed.

Here again we see duPont getting information that we claim is not normally available to competitors in the market, and they are able to do it because of this relationship. And I stated in a statement introducing this entire subject this morning that whereas the keynote of the pool was the exclusion of others—and if you recall I mentioned that ordinarily in patent pools there is some equality in give and take—here because of the overwhelming dominance which outbalances the relationship duPont was able to impose upon the person with whom it was collaborating in this thing so that within the pool it was able to maintain its dominance, too. That is our theory, your Honor.

Government Exhibit 2666, appearing on page 3493, is a letter that was composed in the duPont Company, and the indication is that this was cancelled and corrected. I only put it in for a note that appears up in the right-hand corner.

(Memorandum from Mr. Hatt to Mr. DeRight dated January 31, 1941, was received in evidence and marked "Government's Exhibit No. 2666.")

5821 Mr. Minicus. This exhibit is put in in conjunction with Government Exhibit 2674 and the two are to be considered together. The note in the upper right-hand corner of Government Exhibit 2666 to which I have reference is, "Tabulation attached—Do you wish to continue tabulation comparing sales, less cigarettes (last three columns) or has the interest in this comparison passed?"

Then under that in another person's handwriting, "Yes continue for comparison."

Turning now to Government Exhibit 2674 which we offer in evidence with Government Exhibit 2666——

(Table headed "Sylvania vs. Du Pont—Moistureproof Cellulose Film" was received in evidence and marked "Government's Exhibit No. 2674.")

Mr. Minicus. We see quite an extensive tabulation beginning with the first year of the agreement. In other words, the first date in the left-hand column is 4/26/33, and then through the continuing years this material is set forth quarterly in this tabulation form, just the way the reports were received from salary quarterly. The first column shows the royalties paid by Sylvania, and then

the second column is Sylvania's moistureproof sales in pounds. That is the information that was contained in the Sylvania reports. The third column is Du Pont's moistureproof sales (pounds) including cigarettes (as per agreement). Then in the fourth column is the Sylvania percentage of combined
5822 sales of Du Pont and Sylvania as per agreement. There again we see another recapitulation of all these percentages, this time set forth by quarters, and then an annual total taken at the end of each year. The next column shows domestic and export Du Pont moistureproof sales (pounds) including cigarettes, and by comparing this column with column No. 3, Du Pont moistureproof sales, we find a very slight increase here each year for the exports. The sixth column is Sylvania per cent of combined sales of Du Pont and Sylvania. Here again we have another one of those percentage set-ups showing Sylvania's participation. Column 7 is domestic and export Du Pont M. T. sales (pounds) less cigarettes. The eighth column is Sylvania per cent of combined sales less cigarettes, another column of percentages. And then the final column, Column 9, is Sylvania per cent of Du Pont sales (less cigarettes) as per agreement. In other words, Column 9 can be related to Column 4, and the difference between the two columns there is that Du Pont has subtracted—as they say here, less cigarettes as per agreement, and we see by this column the importance to the Du Pont Company of their dominance of the cigarette outlets because if your Honor will look at the last column for the year 1934, you will find that Sylvania carried a relationship to Du Pont sales of moistureproof cellophane without cigarettes of 30.8 per cent, and yet if we look back to the actual sales that include cigarettes, we find that their participation is 17.4 per cent.
5823 In other words, that is the difference that the cigarette business made to Du Pont. Again for 1935, without cigarettes Sylvania's participation was 36.9, but with cigarettes Sylvania's participation was only 20.4. And you will find that wide discrepancy extending all the way through, as late as 1940, when Sylvania's participation without cigarettes was 31.7 but with cigarettes it was 20.6. That is the last full year we have on that.

I have finished with this section of the operation of the companies under the moistureproof agreement, and I presume that Mr. Gesell has some comments at this time.

Mr. Gesell. I only want to say, your Honor, that these exorbitant royalties that were talked about come to less than a cent a pound.

Mr. Minicus. At this time I would like to introduce Mr. McAuliffe who will continue the Government's presentation.

Mr. McAuliffe. If your Honor please, the Government is now at paragraph 112 of its trial brief, at Roman numeral III 5 b of the section.

In support of this paragraph of the trial brief. I am about to discuss material that is stated in greater detail in paragraphs 140 through 144 of the trial brief, III 4 of the index. By looking at the trial brief it can be seen that the material about to be discussed involves a number of interferences in which Du Pont was involved.

All of these interferences which I am about to discuss were
5824 settled outside the Patent Office. In all but one instance
Du Pont obtained an exclusive right in the issued patents in the field of cellophane.

The Government's purpose in presenting these interferences is to show Du Pont's intent to monopolize the cellophane industry and also to show the effectuation of the Du Pont-Sylvania moistureproof agreement of April 26, 1933.

The first interference which I will discuss is Interference No. 69624, which is designated the Carbide & Carbon Corporation-Du Pont Interference. The Government moves into evidence Government Exhibit 2850 appearing at page 6132.

Mr. Gesell. Now, if your Honor please, I would like to state in some extensive way my objections to this line of proof so that we can have the matter out at the outset and it will save my constantly interrupting Mr. McAuliffe if he goes on. This line of proof is concerned with the settlement by DuPont counsel of 15 interferences declared by the Patent Office. Each of these matters, your Honor, was a litigated matter in the Patent Office and settled by agreement of the parties. It seems to me that we are getting into a collateral and very difficult issue if we are going to pursue it.

5825 If I could use the first interferences, for example, Interference No. 63420, we have an interference that extended over a period there, I would say——

Mr. Minicus. Your Honor, the Government hasn't offered any of this material yet.

Mr. Gesell. You offered the first of these series, and he said he came to that interference, and I want——

Mr. Minicus. We have relaxed a lot of procedure in this trial, but I don't understand under what procedure Mr. Gesell can discuss our evidence on an entire interference before we have put the evidence in.

Mr. Gesell. I am not discussing it.

The Court. As I understand it, Mr. McAuliffe has announced what his offer of proof is going to be. It is to consist of a certain subject matter, and he has discussed that subject matter. Now

2

Mr. Gesell arises and says that if that is to be the offer of proof he wishes to be heard with respect to it.

May I ask you a question, Mr. Minicus?

Mr. MINICUS. Yes, sir.

The COURT. What relaxed procedure is that in a court room?

Mr. MINICUS. It is my understanding that Mr. Gesell has arisen to discuss the evidence that we are about to offer.

5826 The COURT. He wants to be heard on the offer of proof that has been made by the Government.

Mr. MINICUS. Well, is he challenging the materiality of this?

The COURT. I don't know of any procedure that would prohibit him from that.

Mr. MINICUS. Is he challenging the materiality of it?

The COURT. He wants to be heard with respect to it. He has not had a chance to challenge it.

I approve that procedure. Go on, Mr. Gesell.

Mr. GESELL. As I was about to state, your Honor, this particular first interference that is chosen—I will use it as an example to indicate the problem that is presented to the Court as an evidentiary matter. I am not going to get into the merits of it at all.

The COURT. That is right.

Mr. GESELL. But this is a proceeding that stretched from the period of June 1930 until May 1939. It started out as a five-party interference in the Patent Office. Numerous motions of various kinds were filed, decisions were reached by the Examiner, efforts to negotiate a settlement made, an appeal taken to the Patent Office, then a new interference set up of a division of the five-party interference, turning it into two interferences, one of a three-party interference and another a two-party interference, and then various specific counts were put into issue. Some

5827 of those were litigated in the Patent Office and disposed of, some were not, and then the matter was eventually settled between counsel for these five companies that were involved with an agreement.

Now, the papers that are offered, of which this is the first, are a group of papers which we have looked at and which have been taken some from Du Pont files and some from files of others involved in the interferences. In all of this situation there is a very inadequate documentation if we are going to re-litigate these fifteen different court actions—patent actions. The papers declaring the interference are not to be offered. The papers disposing of the interference in the Patent Office are not to be offered.

The COURT. You mean the file wrappers?

Mr. Gesell. No, none of that. We don't have in many instances any indication of the determination of the priority made by the parties.

The Court. Pause.

Will you elaborate your offer of proof, Mr. McAuliffe? What are you going to show by this and what form does it take?

Mr. McAuliffe. Your Honor, we are not trying to relitigate these interferences. We are primarily concerned with the agreement, and it is the Government's position that this agreement——

The Court. What agreement?

5828 Mr. McAuliffe. Which ultimately was the conclusion of the negotiations and which did, in effect, settle these interferences, that that agreement shows it is an expression of Du Pont's intent to monopolize and we think that we are entitled to show that.

The Court. How am I to test the bona fides of the agreement or settlement unless I have the fundamental data upon which it is based?

Mr. McAuliffe. We introduce some of the negotiations that led up to that agreement. We don't go through the litigation itself. We are not concerned with that litigation. We are not trying to raise the litigation as such at this time.

The Court. I am going to try one. I want to see what form——

Mr. Gesell. The first one takes?

The Court. The first one takes.

Mr. Gesell. Then I may renew this, your Honor, at that time?

The Court. Yes.

Mr. McAuliffe. I might inform your Honor, then, what exhibits I am about to introduce in reference to this first interference.

The Court. That is the Carbide and Carbon case?

Mr. McAuliffe. That is right. Government Exhibits 2850,
2337, 2851, 2852, 2853, 2341, 2342, and also in conjunction
with that Government Exhibit 2001, which is not a
5829 new exhibit, but rather an old exhibit that has already been
introduced, Schedule C of that exhibit.

Mr. Gesell. These are all subject to objection that I may have.

The Court. Yes. I want to see what form the proof takes in order that I can evaluate it properly or evaluate the lack of it properly.

Mr. Gesell. Are you including 2344?

Mr. McAuliffe. Excuse me. 2343, 2344, and 2345.

Government Exhibit 2001 at page 2032 informs us that this interference was declared on October 24, 1934.

The next exhibit which I will discuss is Government's Exhibit No. 2850, a letter from W. W. Smith of the Du Pont Patent Service to Mr. J. E. Hatt dated December 13, 1934. The subject of this letter is the "Charch Resin-Wax Interference No. 69,624."

(The letter from W. W. Smith to Mr. J. E. Hatt dated December 13, 1934, was received in evidence and marked, "Government Exhibit No. 2850.")

Mr. McAuliffe. I will commence my reading at the second paragraph:

"We were recently advised by the Patent Office that a five party Interference had been set up involving our Charch resin-wax application Serial No. 461,840. The count involved in the Interference was introduced into our application at
5830 the suggestion of the Patent Examiner and is as follows:"

I will not read the Count from the interference.

"In the following table we have listed the several applications involved including our Charch application and we have shown the assignees, together with whatever information we have been able to find as regards the probable filing dates of the several applications."

I would like to point out that the five assignees were—and the five parties to this intereference were, one, Carbide & Carbon Chemicals Corporation; two, jointly to Carbide & Carbon Chemical Corporation and Eastman Kodak Company; three, Hazel-Atlas Glass Company; four, Sylvania Industrial Corporation; and, five, Du Pont Cellophane Company.

Moving on to the second page of this exhibit or page 6133, the last sentence on this page:

"As you will no doubt recall our Charch resin-wax application involves the moistureproofing of base materials such as regenerated cellulose sheeting with coating compositions comprising certain synthetic resins and a moistureproofing agent such as a wax."

Moving on to the next paragraph:

"From your telephone conversation with Mr. Pralatowski we understand that Dr. Wallach has approached you with the idea of a possible settlement. We have carefully considered this matter and fortunately the presence of Mr. Pritchard in
5831 Buffalo permitted us to take advantage of his reaction also. Obviously, the possibility of settlement is too big a question to decide quickly and after Mr. Pritchard has had opportunity for further consideration we understand that he will advise you further. At the present time we are committed to the belief that the Interference should be carried through to decision by the Patent Office. We are prompted to reach this conclusion, in the first place, because we think we have a very good case and in view of the seniority of Charch, the general importance of the resin-wax method and the comparatively slight loss

The Court. If my recollection is correct, when you offered Government Exhibit 2517 Mr. Gesell objected on the lack of authenticity.

5869 Mr. Minicus. That is correct.

The Court. Then after that, as far as I recall, nothing happened. So do we pick up from there?

Mr. Minicus. Nothing happened that day. The following day I came in and said I believe that certain numbered documents had been admitted in evidence and I went on to discuss them. As a matter of fact, I had omitted to make the formal offer.

Mr. Gesell. I think Mr. Minicus is quite correct, because when he came back the only ones he discussed were ones as to which I had no authenticity objection, so we were in accord.

The Court. Could you read those to me?

Mr. Minicus. The numbers, sir?

The Court. Yes.

Mr. Minicus. Government Exhibit 2891, Government Exhibit 2892, Government Exhibit 2900, Government Exhibit 2902, Government Exhibit 2525, and Government Exhibit 2906.

Each of those is probative of the mutual consent clause and its operation, and at this time I would like to offer them in evidence.

(The letter from J. E. Hatt to Mr. Allen Abrams, Marathon Paper Mills Company, dated August 31, 1939, was received in evidence and marked, "Government Exhibit No. 2891.")

(The letter from J. E. Hatt to Mr. Allen Abrams,
5870 Marathon Paper Mills Company, dated September 5, 1939,
was received in evidence and marked, "Government Exhibit
2892.")

(The letter from J. E. Hatt to Mr. Allen Abrams, Marathon Paper Mills Company, dated October 3, 1939, was received in evidence and marked, "Government Exhibit No. 2900.")

(The letter from J. E. Hatt to Mr. Allen Abrams, Marathon Paper Mills Company, dated November 9, 1939, was received in evidence and marked, "Government Exhibit No. 2902.")

(The letter from Charles F. Daley to Dr. Worth Wade, dated December 21, 1939, was received in evidence and marked, "Government Exhibit No. 2525.")

(The letter from Charles F. Daley to Mr. Allen Abrams, Marathon Paper Mills Company, dated January 9, 1940, was received in evidence and marked, "Government Exhibit No. 2906.")

5871 The Court. Now bring me up to the minute, Mr. Gesell.
You are now about to address your remarks to what particular phase of the Government's case? Is it the interference of Carbide & Carbon?

Mr. Gesell. Two of them, 69,624 and 73,959, which were the two discussed yesterday relating to final resin coatings involving five different parties. Your Honor will recall that when I arose to state my objections with respect to this group of documents, we decided to take sort of a trial run and see what they were about, and I wish, now that they have been read to the Court and the Court is aware of the nature of the proof, to state my specific objections with respect to this line of proof in order that our position will be clear to the Court in the light of the evidence. We have specific objections to specific exhibits and general objections to the group. I wish to discuss my general objections to the group and then my specific objections to the individual exhibits.

My first objection is that since the agreements and documents leading up to the agreement are offered by the Government for the purpose of proving an illegal intent, and the subject matter pertains to the disposition of litigation before the Patent Office, it is required to present all of the facts pertaining to the conduct of the proceeding which was settled.

Wigmore presents the authorities at 7 Wigmore 2108 and
2110 of his third edition, pointing out that judicial
5872 records of all forms of evidence require the utmost com-
pleteness of proof. And since we are dealing with intent,
your Honor, it is particularly appropriate that the full record be presented since, as the official records of the Patent Office themselves disclose, there were in the year that this interference was settled by agreement of the parties some 2,370 other interferences settled between various parties before the Patent Office, and therefore there is nothing in the settlement of the case which is unusual or from which intent can be inferred.

My second general objection goes to the question of the particular necessity of establishing the records upon which priority was determined. It being suggested by the Government that the settlement here was a settlement made with an improper monopolistic intent, it is encumbent upon the Government to show whether the determinations of priority made were fair and in accordance with the contract, because the suggestion is that there was something in the settlement of this interference which was improper. There are no records presented on that issue.

Third, we feel that the re-litigation of these fifteen separate patent disputes takes us into remote and collateral matters which place an undue burden on the record and on the Court and an undue expense on the defendant, and we feel that the material is irrelevant and immaterial.

Turning to the specific objections, I deal first with the basic
document of this group, Government Exhibit 2345.
5873 That is the contract, the 20-page contract which we went
over yesterday. That contract, your Honor, relates to

The Government moves into evidence Government Exhibit No. 2852 appearing at page 6137, which is a letter from L. A. Yerkes to Mr. J. G. Davidson, dated December 23, 1935.

(The letter from L. A. Yerkes to J. G. Davidson dated December 23, 1935, was received in evidence and marked, "Government Exhibit No. 2852.")

Mr. McAuliffe. (Reading:)

"Dear Dr. Davidson: I have your letter of December 12, 1935.

"We had about concluded that it would be impractical if not impossible, to settle the interference in the United States Patent Office No. 69,624, and the Canadian interference now in the Exchequer Court, as well as the Canadian impeachment suit, for reasons of which you were informed.

"Your letter, however, throws a different light on the situation. If we can agree on the license rights and the method of disposing of the present interference and suits, it is probable that we may be able to settle not only the Canadian situation but also the situation in the United States Patent Office.

5836 "I therefore suggest that you write us frankly the uses which you wish to cover."

The Government moves into evidence Government Exhibit No. 2853, a letter from J. G. Davidson, Vice President, Carbide & Carbon Chemical Corporation, to Mr. L. A. Yerkes, dated January 3, 1936.

(The letter from J. G. Davidson to L. A. Yerkes, dated January 3, 1936, was received in evidence and marked, "Government Exhibit No. 2853.")

Mr. McAuliffe. (Reading.)

"Dear Mr. Yerkes: This acknowledges with appreciation your letter of December 23rd with reference to United States Patent Interference 69,624 and the Canadian Interference along the same lines.

"It would, of course, be very difficult for us to predict at this time what our interests will be during the 17 years or more during which the patents in question (if they finally are permitted to issue to anybody) will be in force. Briefly, our position is that we would agree not to use our license in such a way that it would be competitive with Cellophane.

"As a starting point we may assume that we would take any one of the three following positions:

"1. Any coated materials for uses noncompetitive with products of DuPont Cellophane Co., Inc.

5837 "2. Non-transparent coated materials for all uses.

"3. Coated fibrous materials for all uses.

"In any event, we should expect to receive rights to make, use and sell materials (of whatever kind or for the uses agreed upon) coated with vinyl resins and waxes, with the right to grant sub-licenses to our customers to use the invention to the same extent as ourselves employing vinyl resins purchased from us.

"If, in the light of the above and your previous position as stated on March 11th, 1935, there appears to be a possibility of a reconciliation of interests, I will be glad to arrange a meeting at some mutually convenient time."

5838 The Government moves into evidence Government Exhibit No. 2341, a letter from William S. Pritchard to E. P. Boynton, dated November 9, 1936, subject: "du Pont-Carbide agreement (Church v. Fife v. Gray v. Reichel)."

(Letter from Mr. Pritchard to Mr. Boynton dated November 9, 1936, was received in evidence and marked "Government's Exhibit No. 2341.")

Mr. McAuliffe. I will commence reading at the third paragraph:

"After it had been agreed upon between du Pont and Carbide to settle this matter, you will recall that I suggested to you that, since your company was very close to Hazel-Atlas, you or your company make an effort to bring Hazel-Atlas into the settlement, thereby settling the entire matter. We both believed that Sylvania could be brought into the picture. You informed me that you have taken this matter up with Hazel-Atlas and that you either will acquire the Hazel-Atlas application or make some satisfactory arrangement with Hazel-Atlas. It seems to me that, in view of the present proposed agreement between the parties and in view of my suggestion that you contact Hazel-Atlas, if you acquire the Hazel-Atlas application the division of rights with respect to that application should be the same as proposed in paragraph #6 of the agreement. In other words, I believe that if you acquire this application, the division of the field, i. e. non-fibrous to du Pont and fibrous to Carbide, should prevail
5839 as to this application.

"In the event that Carbide does not acquire the Hazel-Atlas application but secures a license thereunder, I believe that du Pont should also secure a license for its field under the Hazel-Atlas application.

"In our telephone conference of November 6th I explained the above to you and you indicated that you recognized that the equities of this phase of the matter were with du Pont. I understand that you are going to Wheeling, West Virginia, in an effort to settle the matter with Hazel-Atlas and I will therefore defer revising the du Pont-Carbide agreement until I hear from you."

The Government moves into evidence Government Exhibit 2342, letter from E. P. Boynton to Mr. Paul R. Ames, who represents Hazel-Atlas, dated January 20, 1938, subject: "Gray Application 482,380 and Interferences Nos. 69,624 and 73,959."

(Letter from E. P. Boynton to Paul R. Ames dated January 20, 1938, was received in evidence and marked "Government's Exhibit No. 2342.")

Mr. McAuliffe. Commence reading as the second paragraph——

Mr. Gesell. Who wrote this letter?

Mr. McAuliffe. Mr. E. P. Boynton of the Patent Department of Carbide & Carbon.

Mr. Gesell. You see, your Honor, we now get into
5840 the third party documents. This is a letter between Union Carbide and their attorneys. It is not from the duPont files, we never saw it——

Mr. McAuliffe. Your Honor, this is——

Mr. Gesell. I am not pressing that objection now because I don't want to keep any facts from the Court, but you see just what a mess this is. I just want to point out we have objections of this kind to these documents, too.

Mr. McAuliffe. Mr. Gesell has indicated his objection on the ground of hearsay and authenticity. This is a third party letter. However, as we can see from the previous exhibit——

Mr. Gesell. I don't mind it being read. Go ahead.

Mr. Minicus. Let him read it then, please.

Mr. McAuliffe. Commence reading at the second paragraph of Government Exhibit 2342:

"Our negotiations in the settlement with DuPont are complete insofar as they will have any effect upon our ability or inability to consummate the arrangement with Hazel-Atlas. As I explained by telephone, as a result of the reopened negotiations with DuPont we will be unable to extend to Hazel-Atlas a license under our own or any other application than the Gray application which will permit the production of coated non-fibrous base materials for any purpose. It has therefore been necessary for us to ask you to restrict the scope of section 3 of the agreement
5841 to exclude the coating of non-fibrous materials from the term 'and other purposes'. Similarly, with respect to the license or rights to be secured for Hazel-Atlas under the provisions of section 7 of the agreement, it will be impossible to have the scope of such rights extend beyond coated fibrous backing materials."

The Government moves into evidence Government Exhibit No. 2343, which is a letter from Paul R. Ames of the Hazel-Atlas Company to E. P. Boynton of Union Carbide & Carbon, dated January 28, 1938.

(Letter from Mr. Ames to Mr. Boynton dated January 28, 1938, was received in evidence and marked "Government's Exhibit No. 2343.")

Mr. McAULIFFE. The subject is "Interferences 69,624 and 73,959-Gray Application 482,380."

"DEAR MR. BOYNTON: I have your letter of January 20 and have communicated with Mr. Gray in regard to your proposed revision of the draft of letter enclosed with my letter of October 14, 1937. He indicated that they would not object to paragraphs 1 and 3 as revised, but that the limitation of the license granted them under section 7 of the agreement to coated fibrous backing materials for use in liners for closures is not satisfactory.

"This limitation of the licenses to be given our client in part consideration for the exclusive license under the Gray ap-
5842 plication is a very substantial change from that set forth in the proposal of our client communicated to you in my letter of January 19, 1937 and accepted by Carbide, as indicated in your letter of March 25, 1937. I do not see how your subsequent negotiations with Du Pont have any bearing upon the proposal which was offered and accepted before those negotiations took place.

"Furthermore, the license to Hazel-Atlas in this regard is of such a limited nature that it cannot have any very important bearing upon the license granted to Du Pont. I assume that they will obtain a license or rights under the Gray application as a result of this settlement and I do not see why Hazel-Atlas's rights, which are already limited to use in liners for closures, should be further limited to a particular type of liner. The claims involved in the interference are not so limited.

"If the letter to Hazel-Atlas is amended by cancelling 'coated fibrous backing materials for' in the third line of clause 2, it will be acceptable to our client and the matter can be speedily disposed of.

"This matter has been pending now for a long time and I should appreciate having it promptly disposed of so that we can close the file before further action becomes necessary in the interference."

The Government moves into evidence Government Exhibit 2344, which is a letter from William S. Pritchard to E. P. Boynton dated August 17, 1938, subject "Re: Interferences Nos. 69,624 and 73,959."

5843 (Letter from Mr. Pritchard to Mr. Boynton dated August 17, 1938, was received in evidence and marked "Government's Exhibit No. 2344.")

Mr. GESELL. Your Honor will note that by this time there has been Patent Office action declaring a division and we now have two interferences.

Mr. McAULIFFE. 73,959, your Honor, is a companion interference to Interference 69,624.

"At the conference which we had in this office on August 4, 1938, at which Mr. Ames, yourself and myself were present, you outlined very definitely to Mr. Ames the position which Carbide proposed to take, namely, that it proposed to sign an agreement with Du Pont and would only sign one with Hazel-Atlas in the event that Hazel-Atlas made its demands more reasonable.

"At that conference Mr. Ames finally disclosed to us uses to which Hazel-Atlas wished to put the invention, in addition to using it on paper for caps or closures. He stated that Hazel-Atlas might wish to use the composition, i. e., the vinylite resin wax to line metal or glass containers. On account of this statement to us we both came to the conclusion that perhaps Hazel-Atlas had some idea that it might wish to make cans for beer, or the like.

"At a conference which we had in my office on August 9th, at which you, Mr. Levin and myself were present, an attempt was made to revise the Du Pont-Carbide contract and the pro-
5844 posed Carbide-Hazel-Atlas contract to give to Mr. Ames
the rights which he requested:

"This revised contract between Du Pont and Hazel-Atlas has been submitted to the Du Pont Legal Department. From the very beginning you and Mr. Ames have both been repeatedly advised that, while we had authority to confer with you and Mr. Ames in preliminary negotiations, no contract could or would be signed by Du Pont that had not been approved by the Legal Department. As a matter of fact, no officer of the Du Pont Company would sign any contract that had not received the approval of the Du Pont Legal Department at Wilmington.

"In studying over new paragraph 5 of the Du Pont-Carbide Agreement, the Legal Department is of the opinion that this is too broad and gives to Hazel-Atlas more than they asked and more than was discussed at our conference of August 4th.

"I enclosed herewith revised paragraph 5 which, in my opinion, more nearly conforms to what Mr. Ames requested. Du Pont is of the opinion paragraph 5 should be restricted to metal or glass containers and rigid closures, and that Hazel-Atlas should not have the right to sell the invention for use in or on containers and closures, but should only have the right to sell the containers and closures. I hope that the DuPont Legal Department will accept this revised paragraph 5. We are submitting it to them today. A copy of this revised paragraph is herewith enclosed:

“Since paragraph 5 of the Du Pont Agreement is in-
5845 tended to be comparable to the second portion of paragraph 7 of the Hazel-Atlas-Carbide Agreement, the second portion of paragraph 5 of your agreement with Hazel-Atlas should accordingly be revised to conform with this new paragraph 5.

“There are other changes in the agreement which are necessary in order to make the Du Pont—Carbide Agreement conform. Thus, paragraph 7b should read as follows:

7(b) A royalty-free exclusive license to make, use and sell, together with the right to license others to make, use and sell throughout the United States and its territories, subject, however, only to the provisions of Paragraph 9 hereof and to a non-exclusive license, other than in the field of non-fibrous cellulose or cellulosic derivative materials, to Hazel-Atlas Glass Company, a corporation of West Virginia, and its subsidiaries, to make and use in or on metal or glass containers and rigid closures and other parts used in or on metal or glass containers and to sell such containers and closures.

(1) Articles of manufacture comprising only nonfibrous base materials coated or treated with vinyl resin-wax compositions for all purposes and uses; and

(2) The vinyl resin-wax compositions to be used in (1) hereof:

5846 “Furthermore, there is a slight inconsistency in paragraph 8(b). The first line of this paragraph should read

* * * a royalty-free license, exclusive except as provided in Paragraph 9 hereof and except for * * *

“Paragraph 9, as you will recall, provides that Carbide shall have the right to grant a license to Sylvania and paragraph 8(b) as now rewritten does not make that exception. The change will cure this. The change has also been incorporated in paragraph 7(b), as you will note.

“Mr. Nelson, of your office, today informed me that the Hazel-Atlas-Carbide agreement had been signed on behalf of Carbide and had already been forwarded to Mr. Ames. I promptly telephoned Mr. Ames and advised him of the foregoing. He took the position that the paragraph as written in the Hazel-Atlas-Carbide Agreement was satisfactory to him and that he could not understand why any change was necessary. I told him that, in all probability, you would request him to return the agreement between Hazel-Atlas and Carbide unsigned by Hazel-Atlas, in order to reform it. I wish you would promptly take the necessary steps in this matter.”

The Government moves into evidence Government Exhibit No. 2345 starting at page 2779.

did not want to take any chances on anybody else
5885 getting into their cellophane field with these inventions.

We have been hearing all the way through this case, your Honor, who wanted a license to moistureproof cellophane. What do we have in these interferences? Carbide Corporation, the second largest chemical corporation in America; Eastman Kodak Company, the company that manufactures the only other transparent film with a cellulose base; Hercules Powder Company, a company whose knowledge of cellulose products is among the greatest in the country, Monsanto, a very resourceful chemical company; and so it goes down the line, your Honor. These are the people that could possibly have been the competitors with duPont in the cellophane field along with a lot of other people. But when Carbide gave up its rights to coat a non-fibrous sheeting with vinyl resins, Carbide certainly indicated an intention that it was never going into the field of coating non-fibrous sheetings, or if it did it would have started under a handicap because it never would have been able to use the invention claimed in these applications, because it had given up its rights to the duPont Company, and duPont drew back from it with exclusive rights to use those vinyl resins in the moistureproofing of non-fibrous products. That is the heart of this whole matter. And we don't care about the interference back of it. I don't think it is essential, your Honor. It is the agreement—the agreement within its own four corners
tells its own story. If it came out of an interference or if
5886 it came out of a contract to build a house it wouldn't make
any difference. If we were here with a contract to build a house, if somebody had not gotten paid for building the house, we wouldn't have to bring the house in. All we would have to bring in is the contract. These just incidentally came out of an interference, it is quite true. But at the time these agreements were executed, your Honor, nobody knew their rights.

I think that is the entire point here, and I think that going through these things, your Honor, we will show a well-developed plan, that every time duPont got into an interference it came out with exclusive rights for cellophane.

Your Honor asked a question, did this matter ever come up before? It has come up, in the famous Hartford Empire case, where agreements settling interferences were put into evidence. And the Court said that the means by which they were settled showed a well-developed plan to monopolize, and the Supreme Court picked out that very language in affirming it.

Thank you, sir.

Mr. Gesell. I have just two comments, your Honor. The first statement is, that we didn't go through the Patent Office—un-

(Agreement between E. I. du Pont de Nemours & Company and Carbide and Carbon Chemicals Corporation was received in evidence and marked "Government's Exhibit No. 2345.")

5847 Mr. GESELL. That agreement is 20 pages long, your Honor.

Mr. MINICUS. May I have a moment, your Honor?

The COURT. Yes.

Mr. MCAULIFFE. Government Exhibit 2345 is an agreement which was ultimately negotiated between Du Pont and Carbide. As the second paragraph informs us, the Church application Serial No. 461,840 is involved in this settlement.

The third paragraph informs us that the Fife application, Serial No. 617,873 controlled by Carbide is also involved in the settlement, as well as the Gray application, which was the application to which Hazel-Atlas was the assignee But here we are informed that Carbide controls this application, and so this application is brought into the agreement.

The second page of this agreement informs us that this agreement settles not only Interference No. 69,624 but also its companion Interference No. 73,959. The counts in Interference 73,959 that are involved in this interference appear on page 2780, or the second page of the agreement. The two counts in Interference 69,624 are described on page 3 of the agreement, or page 2781. The third page also tells us that, "Whereas, Carbide is interested primarily in materials comprising fibrous bases coated or otherwise treated with vinyl resin-wax compositions for all uses; and

"Whereas, Du Pont is interested primarily in materials 5848 comprising non-fibrous bases coated or otherwise treated with vinyl resin-wax compositions * * * and

"Whereas, the parties are interested in settling the Interference * * *" that this agreement has been drawn up.

Now, on page 4 we have paragraph designated 1, and this paragraph deals with the method of determining priority of invention. That goes on for two pages, or up to page 6 of the agreement, page 2784. The second paragraph states:

"In the event of an award of priority by agreement of the attorneys, the party adjudged not to be entitled to the award of priority agrees to execute any necessary concessions of priority to be filed in the Patent Office * * *."

Paragraph 3 says:

"In the event any or all of the other parties now involved in Interferences Nos. 69,624 and 73,959 continue to prosecute the Interferences, then Du Pont and Carbide agree to mutually cooperate and aid each other as may be necessary in order to secure such favorable awards to Du Pont or Carbide, or both, as may be warranted by their respective proofs for the interfering subject matter."

Now we come into the heart of the agreement, and I would like to read these paragraphs:

"4. Du Pont, subject to the provisions of Paragraph 16 hereof, hereby grants and by these presents has granted to Carbide
5849 under the said counts of said Interferences and any more
specific claims dominated by the said counts secured in any patent granted on application for United States Letters Patent Serial No. 461,840, or on any and all divisions, continuations in whole or in part, or renewals thereof, or substitutes therefor, for the entire term or terms for which said Letters Patent is or are granted, reissued or extended,

(a) A royalty-free, non-exclusive license to make, use and sell, together with the right to license others to make, use and sell, throughout the United Sates and is territories,

(1) Wrapping tissues comprising only fibrous base materials coated or treated with vinyl resin-wax compositions;

(2) Fabrics, woven or knitted, coated or treated with vinyl resin-wax compositions; and

(3) The vinyl resin-wax compositions to be used in (1) and (2) hereof;

(b) A royalty-free, exclusive license to make, use and sell, together with the right to license others to make, use and sell, throughout the United States and its territories,

(1) Articles of manufacture comprising only fibrous base materials coated or treated with vinyl resin-wax compositions for all purposes and uses save and except as provided
5850 in (a) hereof; and

(2) The vinyl resin-wax compositions to be used in (1) hereof;

(c) The right to practice the invention or inventions licensed in (a) and (b) hereof."

I might explain at this time, your Honor, that non-fibrous base materials relate to cellophane whereas fibrous base materials do not.

"5. Du Pont, subject to the provisions of Paragraph 16 hereof, hereby grants and by these presents has granted to Carbide the right to grant a royalty-free, non-exclusive license, other than that in the field of non-fibrous cellulose or cellulose derivative materials, to Hazel-Atlas Glass Company, a corporation of West Virginia, and its subsidiaries, to make and use in or on metal, glass or other rigid containers and rigid closures and other parts used in or on metal, glass or other rigid containers and to sell such containers, closures and other parts under the said counts of said Interferences and any more specific claims dominated by said counts secured in any patent granted on application for United States Letters Patent Serial No. 461,840, or on any and all divisions, continuations in whole or in part, or renewals thereof, or substitutes therefor, for the entire term or terms for which said Letters Patent is or are granted, reissued or extended. This right shall be assignable only by Hazel-Atlas Glass Company to the successor in interest to its closure and container business. 5851

"6 Carbide covenants and agrees that it will not grant any license or sub-license to any of its customers except of a standard form approved by Du Pont, and Carbide agrees that, after the execution of any license or sub-license, it will promptly furnish Du Pont with a copy thereof.

Carbide agrees that its standard form of license or sub-license will contain a cancellation clause which will permit Carbide to cancel said license or sub-license, in the event said licensee or sub-licensee breaches any of the covenants and agreements thereof, and Carbide covenants and agrees that it will cancel said license or sub-license in the event that the license or sub-license is being breached and the breach is not cured within Thirty (30) days after notice has been given to the licensee or sub-licensee.

Carbide covenants and agrees that any and all licenses or sub-licenses which it grants to its customers, as provided herein, shall be subject to the terms and conditions of this agreement, and, in the event this agreement or license granted hereunder to Carbide is canceled or otherwise terminated by Carbide or Du Pont, any and all licenses, sub-licenses, rights, privileges and benefits granted by Carbide to its customers hereunder shall be ipso facto canceled or terminated.

5852 "7. Carbide, subject to the provisions of Paragraph 16 hereof, hereby grants and by these presents has granted to Du Pont under the said counts of said Interferences and any more specific claims dominated by the said counts secured in any patent granted on application for United States Letters Patent Serial No. 617,873, or on any and all divisions, continuations in whole or in part, or renewals thereof, or substitutes therefor, for the entire term or terms for which said Letters Patent is or are granted, reissued or extended.

(a) A royalty-free, non-exclusive license to make use and sell; together with the right to license others to make, use and sell, throughout the United States and its territories,

(1) Wrapping issues comprising only fibrous base materials coated or treated with vinyl resin-wax compositions;

(2) Fabrics, woven or knitted, coated or treated with vinyl resin-wax compositions; and

supported by any facts. There were six years of litigation before this settlement, none of which he shows.

Second, how can you judge what an agreement provides without knowing its subject matter? And your Honor cannot on these documents tell what patents are involved or what applica-
5887 tions are involved. He is going to argue, as he has, that it kept Carbide out of the cellophane business. Do you know what patents were involved and whether with those patents anyone could have gone into the cellophane business, or whether those claims read on other patents which would have excluded them anyhow, when you don't have the subject matter here? I don't see how you can tell it. And this is a partial, trimmed presentation to a pre-conceived premise reached without investigation of the facts.

The Court. Well, whatever ruling I make it seems to me goes to this whole category. Is your preparation of the case resilient enough that you could take up another category for the rest of the day and let me ponder this thing until next Tuesday, because I think it is of some importance, or are you so prepared that you cannot take up another subject?

Mr. Minicus. We can take up another subject, your Honor. It just happens that at this time we may run into a little difficulty later in the day. The section that will immediately follow the section I can put in now is being re-worked. It is the first time we have done that in this case, the first time we have come in where we could not go right ahead. We do run into a block there. I cannot guarantee we will use up the rest of the day if we do not put in this interference material at this time. In other words, the material immediately to follow is prepared and ready to go in, your Honor, but whether it will use up the entire day, I cannot say at this time.

5888 The Court. Under this Sub-section 4 the proof, as you have offered it, will consist in general of the same elements as has been brought forward in the case of Carbide & Carbide Corporation?

Mr. Minicus. Yes, your Honor. In most instances it will show correspondence leading up to the agreement and the ultimate agreement whereby in the specific grants of the agreement this division that we allege is made.

The Court. Can you finish that section today?

Mr. Minicus. Oh, most easily, your Honor, I think we could finish that section this morning.

The Court. I am going to hear what your proffer is on each of those items from a to m under Sub-section 4, reserving the determination as to whether I think it is admissible, because I think I will save time if I hear it now and get it out of the way.

(3) The vinyl resin-wax compositions to be used in (1) and (2) hereof;

(b) A royalty-free exclusive license to make, use and sell, together with the right to license others to make, use and sell throughout the United States and its territories, subject, however, only to the provisions of Paragraph 9 hereof and to a non-
exclusive license, other than in the field of non-fibrous cel-
5853 lulose or cellulosic derivative materials, to Hazel-Atlas
Glass Company, a corporation of West Virginia, and its subsidiaries, to make and use in or on metal, glass or other rigid containers and rigid closures and other parts used in or on metal, glass or other rigid containers, and to sell such containers and closures,

(1) Articles of manufacture comprising only non-fibrous base materials coated or treated with vinyl resin-wax compositions for all purposes and uses; and

(2) The vinyl resin-wax compositions to be used in (1) hereof;

(c) The right to practice the invention or inventions licensed in (a) and (b) hereof."

5854 Now, this paragraph, Paragraph 7 (b) is that point in
the agreement in which Du Pont is given its exclusive right to the issued patents or the patents under which Carbide has control in the field of cellophane; 7 (b), they are given a royalty-free exclusive license to make, use, and sell articles of manufacture comprising only non-fibrous base materials.

Mr. **Gesell.** Of course, no patents have issued yet, your Honor. There isn't any grant of any rights when the patents are not in existence.

Mr. **McAuliffe.** That is very true, your Honor, and it is one of the points which we intend to stress later.

(Reading.)

"8. Carbide, subject to the provisions of Paragraph 16 hereof, hereby grants and by these presents has granted to Du Pont, under the said counts of said interferences and any more specific claims dominated by said counts secured in any patent granted on application for United States Letters Patent Serial No. 482,380"—that is the Gray application, the Hazel-Atlas application—"or on any and all divisions, continuations in whole or in part, or renewals thereof, or substitutes therefor, for the entire term or terms for which said Letters Patent is or are granted, reissued or extended.

"(a) A royalty-free, non-exclusive license to make, use and sell,
together with the right to license others to make, use and
5855 sell, throughout the United States and its territories.

"(1) Wrapping tissues comprising only fibrous base materials coated or treated with vinyl resin-wax compositions;

Mr. GESELL. Can we understand, your Honor, that I have the same continuing objection to the specific documents of the specific kind I named—

The COURT. When Mr. McAuliffe finishes his presentation in this phase of the case you will have an option either to make comment at this time or to refrain from comment, depending upon what ruling I make on the evidence.

Do I make that clear?

Mr. GESELL. Yes. What I want to make clear is that
5889 my objections of the same kind are being pressed of a specific character to documents that are incomplete and to the
general subject matter.

The COURT. In that respect, then, I think maybe you had better articulate your objections for the purposes of the record so they will afford me a basis of study.

Mr. GESELL. As we go through?

The COURT. As we go through.

Mr. GESELL. Very well, your Honor, I will do that.

The COURT. When you have a breath, Mr. Minicus, will you have one of your associates tab that language in the Hartford-Empire case?

Mr. MINICUS. We have it right here, your Honor.

The COURT. Hand it to me some time during the recess so I can read it.

Mr. MCAULIFFE. The next interference which the Government will discuss is Interference No. 71,448 and 71,449, which will be discussed together, the Eastman Kodak-Du Pont intereference.

The Government moves into evidence Government Exhibit 2860, a letter from Mr. W. W. Smith dated October 1, 1935. This letter was addressed to Mr. J. E. Hatt, subject Hershberger Serial No. 681,293—Interference No. 71,448.

(The letter from W. W. Smith to J. E Hatt dated October
1, 1935, was received in evidence and marked, "Govern-
5890 ment Exhibit No. 2860.")

Mr. MCAULIFFE. (Reading.)

"We have now been advised that our Hershberger application, identified above, has become involved in an interference with an application of Eastman Kodak Company and an application of Swann Research, Inc.

"Our Hershberger application relates to a method of applying a moistureproofing coating by melting the moistureproofing composition, which is preferably a mixture of waxes or waxes with added resin, blending agent, or small amount of cellulose derivative and applying the molten mass to the sheet of material to be moistureproofed, and subsequently passing the coated sheet be-

"(2) Fabrics, woven or knitted, coated or treated with vinyl resin-wax compositions; and

"(3) The vinyl resin-wax compositions to be used in (1) and (2) hereof;"

Next, (b) will reveal that Du Pont got an exclusive license or right to the Gray application in the field of cellophane also.

(Reading.)

"(b) A royalty-free license to make, use and sell, together with the right to license others to make, use and sell, throughout the United States and its territories, said license to be exclusive except as provided in Paragraph 9 hereof and said license being fully co-extensive with the rights Carbide acquired from Hazel-Atlas by agreement dated August 12, 1938,

"(1) Articles of manufacture comprising only non-fibrous base materials coated or treated with vinyl resin-wax compositions for all purposes and uses; and

"(2) The vinyl resin-wax compositions to be used in (1) hereof;

"(c) The right to practice the invention or inventions
5856 licensed in (a) and (b) hereof.

"9. Carbide agrees that, if it obtains a patent as a result of the said Fife application or the said Gray application containing a claim or claims covering cellulose materials that are or can be obtained by precipitation, recovery or coagulation from an aqueous or alkali aqueous solution"—they are talking about cellophane again—"and coated with a vinyl resin-wax composition, then and in that event only it will grant to Sylvania Industrial Corporation, a corporation of Virginia, and having a place of business in the City, County and State of New York, a royalty-free, non-assignable license to make, use and sell throughout the United States and its territories, present and future, cellulose materials that are or can be obtained by precipitation, recovery or coagulation from aqueous or an alkali aqueous solution and coated with a vinyl resin-wax composition in which the vinyl resin is as defined in the counts of said Interferences under any United States Letters Patent which may be granted on the said Fife application or on the said Gray application or on any and all divisions, continuations in whole or in part, or renewals thereof, or substitutes therefor, for the entire term or terms for which said Letters Patent is or are granted, reissued or extended."

Paragraph 10 discusses what shall happen in case one party,
Carbide or Du Pont, decides to abandon its application
5857 or applications.

In Paragraph 11 Carbide grants royalty-free licenses to Du Pont under one of its patents, and in Paragraph 12 Carbide agrees that it will not grant a license, express or implied or otherwise, to make, use, or sell transparent sheets of film for use as tween heated doctor knives in order to obtain immediately a clear, transparent and tack free coating.

"Although additional counts may be entered in this interference, there is at present only one count involved and for your information, we quote this as follows:"

I will skip the count of the interference.

"It is too early for us to predict with any degree of certainty the possible outcome of this interference.

"We can say this much however with regard to our Hershberger application: namely, that it covers a process which we are not using at the present time and the count at interference involves a film of cellulose acetate coated with an ester gum wax moisture-proofing composition, which article of manufacture is 5891 something we are not making and probably will not make, either because we may not make the cellulous acetate sheeting or we will have a coating composition which will produce much better results. From your point of view then, the loss of a claim such as quoted above will not be so seriously detrimental inasmuch as it will not affect what you are doing in your present business."

The Government moves into evidence Government Exhibit 2862, a letter from Mr. W. W. Smith to J. E. Hatt, dated October 2, 1935, subject "Charch U. S. Serial No. 461,840 (Interference No. 71,449)".

(The letter from W. W Smith to J. E. Hatt, dated October 2, 1935, was received in evidence and marked, "Government Exhibit No. 2862.")

Mr. McAuliffe. (Reading.)

"The above identified U. S. application has now become involved in a four party interference including applications of Eastman Kodak, Swann Research, Inc. and an application, which, although not assigned to Wolff & Company is in the names of inventors who we know are associated with Wolff.

"Our Charch application is the resin-wax case which is additionally involved in a number of other interferences and relates, as you know, to the moistureproofing of cellubsic materials such as regenerated cellulose with a coating composition com- 5892 prising a resin and a wax. Although other counts may be added during the course of the interference, there is at present only one count which, for your convenience, we quote at follows:"

I will skip the count in the interference.

"The count of the interference was suggested by the Examiner and we copied it into our case, fully suspecting that the interference would be set up to include the Eastman case. We were not aware of the existence of the other applications, to Swann and wrapping tissues under the aforesaid Robertson Reissue Patent No. 20,080, which they have just licensed to Du Pont in this agreement and under any patent issued on any division or continuation of the aforesaid original Robertson patent No. 2,010,963 for the entire term or terms for which said Letters Patent has or may be granted, reissued, or extended.

Paragraph 13 is concerned with the licensing of future patents. I would like to read that.

"13. Carbide covenants and agrees that it will grant to Du Pont a royalty-free, non-exclusive license to make, use and sell non-fibrous materials coated with a vinyl resin-wax composition in which the vinyl resin is as defined in the counts of said Interferences for use as a wrapping tissue, and not otherwise, under any patent or patents (other than the patent or patents hereinabove specifically provided for) which it now has or hereafter acquires or concerning which it has the right to grant such royalty-free, non-exclusive license and which relate to vinyl resin-wax compositions or non-fibrous materials coated with a vinyl
5858 resin-wax composition, for the entire term or terms for
which said Letters Patent is or are granted, reissued or extended. In the event that the patents herein referred to are not wholly owned by Carbide and in the event that Carbide has not the right to grant such royalty-free, non-exclusive license to Du Pont, Carbide will use its best efforts, at the request of Du Pont to obtain for Du Pont a royalty-free license of the character defined herein under any such patent, and Carbide will also use its best efforts, in the event that it has been unsuccessful in getting such royalty-free license for Du Pont, to obtain, at the request of Du Pont, a license under such patent on terms as satisfactory as possible, the acceptance of such license and such terms to be at the option of Du Pont."

5859 The next paragraph is a definition of the term "wrapping tissue."

Paragraph 15 relates to what will happen in case of bankruptcy, if one of the companies goes into bankruptcy. I will not read those paragraphs.

Paragraph 16 I will read:

"It is mutually agreed and understood that, notwithstanding anything in this agreement to the contrary, the rights and licenses and sub-licenses referred to in this agreement are restricted to the United States Letters Patent specifically mentioned or which may issue on the applications herein specifically identified, and that neither party hereto, except as provided in Paragraphs 11 and 13 hereof"—and if you will recall, paragraph 13 was the provision in which Carbide agreed to license Du Pont future patents—"is to receive any right or license, either expressed or implied or otherwise, under any claim or claims of any other United States Letters Patent now owned or hereafter acquired by any of the parties hereto."

Paragraph 17 states that short forms of licenses will be used for recording in the United States Patent Office, and paragraph 18 states:

"It is mutually agreed that in the event any party hereto breaches any of the covenants or provisions of this agreement, the other
party shall have, at its option and election, the right to
5860 cancel the agreement or any of the rights or licenses granted
in said agreement to the party breaching the agreement
upon written notice specifying the breach to the party breaching the agreement, unless the breach is cured and remedied within Thirty days after the date of said notice."

Paragraph 19 relates to the assignment of this agreement to successors of either Carbide or Du Pont, and this agreement is signed by Mr. Yerkes on page 2796 and Mr. J. G. Davidson.

Finally, Government Exhibit No. 2001 at page 2032 informs us that in this particular interference Du Pont did win priority, that priority was awarded to Church in Interference 69,624 and in Interference No. 73,959. However, as the subsequent interferences are presented it will be seen in just how many instances Du Pont was awarded priority in these interferences.

I would like to repeat, your Honor, that the primary purpose of the Government's presentation of these interferences has been to show their intent to monopolize and, in effect, the Du Pont-Sylvania 1933 moistureproof agreement.

The Court. Are you finished?

Mr. McAuliffe. I am finished with this particular interference, your Honor.

The Court. Have you any comment?

Mr. Gesell. Well, your Honor, I think it demonstrates the
problem that confronts us. There is no indication of the
5861 various Patent Office actions which were taken. It is a
very incomplete, partial bit of the evidence. As you go
down each one there are references made to other letters and other drafts of the agreements. We don't know what happened to Hazel-Atlas; we don't know where everybody else went. When it is all over it turns out that Du Pont was prior, and we are accused of an attempt to monopolize on this type of presentation, and we are accused of keeping Carbide out of the manufacture of cellophane on the pleadings in this case.

I think that the evidence is not probative to that; I think it is incomplete. I don't think it should come in on this kind of a presentation for the purposes that the Government n[illegible] offers it.

Wolff, and with regard to the Eastman application we rather felt that our chances of winning the interference would be reasonably good. The loss of the present count however should not be detrimental to your present business."

The Government moves into evidence Government Exhibit No. 2347, a letter from Mr. William S. Pritchard to Daniel I. Mayne, of Eastman Kodak, dated November 26, 1935, subject "Interferences 71,448 and 71,449."

(The letter from William S. Pritchard to Daniel I. Mayne, Eastman Kodak Company, dated November 26, 1935, was received in evidence and marked, "Government Exhibit No. 2347.")

Mr. McAuliffe. (Reading.)

"Mr. Daley has informed me of your recent talk with him wherein you made inquiry as to whether or not Du Pont would be willing to settle the above-entitled interferences, in so far as Du Pont and Eastman are concerned.

"Mr. Daley has further informed me that you 5893 indicated that Eastman might be willing to settle the interferences on the basis of an exchange of licenses, even if such licenses restrict and limit Eastman to the manufacture of cellulose acetate films under the inventions in question.

"Du Pont Cellophane Company, Inc. is always interested in working harmoniously with other companies and is willing to settle any interference if the two parties can reach some mutually satisfactory arrangement.

"I have been instructed by Du Pont Cellophane Company, Inc. to settle interference 71,448 which relates to cellulose acetate film, if a mutually satisfactory arrangement can be made.

As to interference 71,449, this interference relates to regenerated cellulose film bases. As you probably know, Du Pont Cellophane Company, Inc. is as much interested in such bases as Eastman is in cellulose acetate. Accordingly, there does not appear to be any prospect of settling this interference, in so far as this count is concerned."

The Government moves into evidence Government Exhibit No. 2350, a letter from William S. Pritchard to D. I. Mayne, dated December 23, 1935, subject "Interference 71,448 and 71,449."

(The letter from William S. Pritchard to D. I. Mayne, dated December 23, 1935, was received in evidence and marked, "Government Exhibit No. 2350.")

5894 Mr. McAuliffe. (Reading.)

"Referring to our conference on December 16, 1935, relative to the above-entitled interferences, Du Pont is willing to settle this matter with respect to ester gum-wax compositions upon the terms discussed with you.

I can go down the material in detail, if your Honor wishes, but I doubt that it is necessary.

The Court. As far as I can see, this evidence on the interference proceedings shows a group of patent attorneys engaged in a form of corporate horse-trading, and at the present moment I fail to grasp its significance, but maybe at a later date the utility of this evidence for decision of the case will be made significant, and simply because of that latter consideration I have listened to this evidence this afternoon, and I shall give it whatever weight it deserves. It depends again upon what complexion the evidence with respect to the interference proceedings takes 5862 tomorrow as to whether or not I shall proceed to hear it or cut it off.

Mr. Gesell. Well, how does your Honor wish me to proceed? If I were to undertake to comment with respect to each one after we finish it and discuss the parties and what I understand happened——

The Court. Yes.

Mr. Gesell. And try to bring in the file wrappers——

The Court. Let us try that technique tomorrow morning for the first one and see how it works out.

Mr. Gesell. Very well, your Honor.

The Court. Adjourn Court to tomorrow at ten-thirty.

(At this point the trial was adjourned to Friday, April 27, 1951, at 10:30 o'clock a. m.)

* * * * *

5868 Friday, April 27, 1951, 10:30 O'clock, A. M.

Present: As before noted.

Mr. Minicus. Before we begin on the interferences this morning, your Honor, I have one preliminary matter that was brought to my attention in the course of reading the transcript last night. On Wednesday evening I was introducing a group of documents in evidence probative of the extent to which the mutual consent of Du Pont and Sylvania was necessary under the Marathon agreement, and as I was introducing those documents an objection arose, and by the time the objection had been discussed we recessed for the afternoon.

The Court. That was 2517, wasn't it?

Mr. Minicus. Yes, that was 2517. The following morning I said that I believed that the group had been formerly introduced. In reading both transcripts for the two days I find out that is not the case. Therefore, as this time, if your Honor please, I would like to amend the transcript to offer that block of documents in and indicate that it relates back to their previous discussion. They have been discussed but they have not formally been offered or admitted in evidence.

"Toward the end of the conference you raised the question of Eastman securing the right to use resin-wax compositions other than ester gum-wax. You seemed to be particularly anxious that Eastman have the right to use vinyl resin-wax compositions. As to the use of resin-wax moistureproofing compositions other than ester gum-wax, Du Pont is willing to grant Eastman the right so to do, provided Eastman pays a royalty. This royalty, in my opinion, must be fixed at not less than 2% of the selling price because of other contracts which the Du Pont Cellophane Company has."

It is the Government's belief that this is a reference to the Du Pont-Sylvania agreement.

Mr. Gesell. This is a belief unsupported by any evidence.

Mr. McAuliffe. The Government moves into evidence Government Exhibit No. 2351, a letter from Mr. William S. Pritchard to D. I. Mayne, dated January 24, 1936, subject "Interferences Nos. 71,448 and 71,449."

(The letter from William S. Pritchard to D. I. Mayne, dated
January 24, 1936, was received in evidence and marked,
5895 "Government Exhibit No. 2351.")

Mr. McAuliffe. (Reading.)

"I have your letter of January 21, 1936, advising me that the agreement which I have prepared is 'quite satisfactory', and also including your comments thereon.

"You fully appreciate that at the time I handed you a draft of the agreement I did ~~not~~ have Du Pont's comments. Just prior to the receipt of your letter I received Du Pont's comments.

"The most important comment made by Du Pont relates to the definition of the bases of the material which you are to be licensed to moistureproof under the license. Du Pont, and quite properly so, takes the position that Eastman is interested in moistureproofing cellulose acetate sheets, films or foils, and that since the counts of the interferences are so restricted the license to Eastman should be thus restricted."

The Government moves into evidence Government Exhibit 2352, a letter from William S. Pritchard to D. I. Mayne, dated April 17, 1936, subject, "Interferences Nos. 71,448 & 71,449."

(The letter from William S. Pritchard to D. I. Mayne, dated April 17, 1936, was received in evidence and marked, "Government Exhibit No. 2352.")

Mr. McAuliffe. (Reading.)

"Referring to my letter of April 9, 1936, I am herewith
enclosing the original and duplicate original agreement
5896 between Du Pont and Eastman Kodak relating to the set-
tlement of the above-entitled interferences.

This agreement was discussed with you when you were in my office on February 20, 1936, at which time you tentatively agreed to the terms.

"There is, however, one change that has been made in the agreement, the draft of which you saw on February 20th. This change is in Article 4, section (a). Referring to Article 4, section (a), you will note that Du Pont is to have the right to sub-license under any dominating claims which Eastman may secure to any Du Pont sub-licensee under the provisions of Article 2 of this agreement, the right to license under this Article 4, section (a) to Du Pont to be restricted to moistureproofing sheets, films or foils of regenerated cellulose and sheets, films or foils which are obtained or can be obtained by precipitation or coagulation from an aqueous or alkali-aqueous solution. This is necessary because of Du Pont's prior agreements."

Another reference to the Du Pont-Sylvania agreement of 1933.

Mr. GESELL. It says "commitments"; it does not say "agreements."

Mr. McAULIFFE. The Government moves into evidence Government Exhibit 2356, a letter from J. E. Hatt to F. G. Hess, dated May 13, 1936, subject "Proposed Settlement of 5897 Interferences Nos. 71,448 and 71,449."

(The letter from J. E. Hatt to F. G. Hess dated May 13, 1936, was received in evidence and marked, "Government Exhibit No. 2356.")

Mr. McAULIFFE. This memo discusses in detail divisions under the proposed agreement. I will read the paragraph commencing on page 2822:

"The applications of ours which are involved are largely defensive ones and outside of the process right to Eastman to coat acetate sheeting with resin and wax above the melting point of wax as provided in the Charch patent, we are not giving away anything of substantial importance."

Here we see evidence of Du Pont's policy of accumulating patents for the perpetuation of its control over the manufacture of cellophane.

The Government moves into evidence Government Exhibit 2357, a memo from L. A. Yerkes to the Board of Directors of Du Pont Cellophane Company, Inc., dated May 18, 1936. This memo is a discussion of the terms of the proposed agreement between Du Pont and Eastman Kodak relative to interferences 71,448 and 71,449.

(The memo from L. A. Yerkes to Board of Directors, Du Pont Cellophane Company, Inc., dated May 18, 1936, was received in evidenced and marked, "Government Exhibit No. 2357.")

5898 Mr. McAuliffe. I will read the third paragraph on page 2823.

"It appears likely that Eastman stands a better chance than duPont to prevail in these interferences, and the enclosed agreement has been prepared (and already executed by Eastman under date of May 7, 1936), * * *."

Turning to page 2825 of the same exhibit, the paragraph commencing on that page:

"The applications of duPont which are involved are largely defensive ones, and outside of the process right to Eastman to coat acetate sheeting with resin and wax above the melting point of wax (as provided in U. S. Patent No. 1,826,699), we are not granting anything of substantial importance."

The Government moves into evidence Government Exhibit 2358. This is an agreement which was signed by both Du Pont and Eastman Kodak settling this interference. It was signed by Du Pont on June 3, 1936, and by Eastman Kodak on May 7, 1936.

(The agreement between Du Pont and Eastman Kodak was received in evidence and marked "Government Exhibit No. 2358.")

Mr. McAuliffe. I would like to read Paragraph 2 of this—portions of Paragraph 2 of this agreement which appear on page 2830.

(Reading.) "Eastman covenants and agrees to grant and does hereby grant to Du Pont a royalty-free license and also the right to Du Pont to grant sub-licenses to others
5899 * * * under the claims of any patent issuing on the Beach application for United States Letters Patent Serial No. 551,491, * * * said license to Du Pont to be exclusive, with the right to grant sublicenses, to make, use and sell moistureproof sheets, films or foils formed of regenerated cellulose and sheets films or foils which are obtained or can be obtained by precipitation, recovery or coagulation from an aqueous or alkali-aqueous solution, and non-exclusive as to making, using and selling moistureproof sheets, films or foils of organic derivatives of cellulose other than those sheets, films or foils which are obtained or can be obtained by precipitation, recovery or coagulation from an aqueous or alkali-aqueous solution."

Government Exhibit 2001 at page 2032 informs us that in Interference No. 71,448 priority was awarded to Beech, and Interference No. 71,449 was dissolved.

That is all I am going to say about these two interferences.

The Court. Let me refer again for a moment to what I call my judicial hypochondria:

From the Government's exhibits which have been offered on the Eastman Kodak interference what do I have to evaluate the vapatent applications and interferences, but those are not presented, and accordingly, the subject matter of the contract which the Government says was entered into with an illegal monopolistic intent is not presented to the Court. There is no record presented as to what patents were licensed pursuant to the contract or what applications and interferences were settled.

I say that if a contract is to be offered in evidence against a defendant with a charge that the execution of the contract discloses a monopolistic intent, it is necessary at a minimum for us to know what was the subject matter of the contract. And that subject matter is not disclosed for we know not what patents were licensed under the contract or what applications and interferences were settled by the contract.

The COURT. Mr. Gesell, you are familiar with the minutiae of proof in the I. C. I. and the National Lead case and perhaps your experience extends to others cases. Have you ever seen an offer of proof fall into categories such as this, namely, a review of interference proceedings in which one of the defendants may have been a party? The reason I ask the question is, I want to know how other Courts have handled the problem.

Mr. GESELL. In an anti-trust case?

The COURT. Yes.

5874 Mr. GESELL. There was, I believe, in the I. C. I. case an issue as to the circumstances under which a particular patent was obtained by duPont, and there the Government offered the entire file wrapper of that proceeding in evidence. That, your Honor, as it comes to me standing here, is the only instance that I recall, and I know of no case in which I have been involved nor can I recall any other where a situation such as we have presented here was involved. But it would seem to me, your Honor, that we must first determine whether the subject matter we are dealing with is of any consequence. We don't know that. Then we have to determine when an issue of intent is presented, what really is a fair presentation of evidence on the issue of intent because intent is not something you read from the face of a contract the subject matter of which is not even disclosed, whatever that contract says.

5875 My interest here, your Honor, is to see if we can't on this issue at least reach some basis for narrowing the proof and limiting the scope of this proceeding, because if we are to go into these fifteen different patent interferences which comprise three whole books of the Government's proof on their very scanty presentation, it must be apparent to your Honor that a review of the material to bring the complete record into focus is going to involve us not only in further documentation and indications of Patent

Office action, but I take it it is going to put us into chemical issues and chemistry issues and technical issues.

Here, for example, is this vinyl-resin coating which is involved was dominated in the field of cellophane by Du Pont's basic moistureproof patent. That is an issue that can't be determined from these documents, but we will have to get into it if it is said that Du Pont by reserving vinyl-resin coatings as to cellophane for itself was expanding its monopoly in some respect, when actually no one els could have ever made vinyl-resin coatings in the cellophane field without a license under the basic product patent in any event.

The **Court**. You have greater familiarity with the complaint and answer than I. I wonder could you show me where the issue is joined in this particular matter?

Mr. **Gesell**. It is tendered, your Honor, by the complaint. If I may have a moment I will find it.

5876 If your Honor will look at the print of the complaint at page 40, Paragraph 33, sub-paragraph (e), I believe that is the one that tenders the issue. That is the allegation that says that patents relating to cellophane and caps and bands have been utilized by the defendant to exclude or suppress competition by means of unlawful devices, tactics, and practices, including—and then we come to (e): "Settlement of patent disputes whereby Du Pont and others by agreement have defined and allotted to Du Pont as an exclusive field of operation the cellophane and caps and bands industry, and similarly have defined and allotted to said others certain related fields of business activity."

I think that is where the issue is tendered on the complaint, but that sounds in illegality, your Honor; that sounds in terms of these interference suits which were settled by the various counsel for these different interests as having been settled in an improper or illegal manner, and certainly that is what the Government suggests when it says the settlement shows an intent to monopolize, because that is——

The **Court**. Do I get your point along this line? Is it that there is a deficiency in documentation as to this proof? Suppose the whole file wrapper went in, what more could you ask? Is that your point, that the Government is simply selecting the writings it desires?

5877 Mr. **Gesell**: I have two points, your Honor: That if it comes in at all it will have to come in in toto so we understand what happened. You can't deal with issues of intent by selecting tidbits here and there and only showing a part of the story.

Then I have a fundamental question in my mind as to whether on the offer so far made there is a sufficient showing by the Government that this line of investigation is going to be useful in the case, that there is going to be developed any facts which are probative in any degree, and it seems to me that they must make some showing to your Honor as to what the subject matter was and as to how Du Pont's monopoly position which they talk about was extended or expanded.

We have one long one here, your Honor, if I may divert for a moment, relating to a patent on the use of cellophane on the grips of golf clubs which Spaulding Brothers, the sporting goods outfit, was interested in. We have another relating to the use of cellophane as an inner liner for cans involving the American Can Company. Well, now, as far as I am aware, neither Du Pont nor the American Can Company ever practiced that invention, and as far as cellophane sold on the handles of golf clubs is concerned, that was tried experimentally, I understand, and came to nothing.

What I am suggesting to your Honor is that unless the subject matter of these interferences is shown to be of consequence in this industry and of consequence to Du Pont's 5878 position, isn't it—considering the collateral nature of the problem—an undue burden on the defendant and on the Court to pursue these three volumes of documents and these scores and scores of exhibits and the responding proof that that may engender, particularly when we are concerned here with the settlement of litigated matters before the Patent Office on which orders were issued by the Patent Office, conducted in the customary manner in accordance with the rules of the Patent Office by counsel of repute for concerns which were involved in interferences brought about by the Patent Office?

So I have two broad positions. They have to present the whole story if it is pertinent at all, and I don't think it is.

If I may go down the specific documents and point out what is involved on this question of completeness, your Honor, I think I can emphasize that point a bit further.

Government Exhibit 2850 refers to the interference, but the interference is not offered. It refers to various applications, but the applications are not offered. It refers to a Patent Office Examiner's action, which is not offered. It refers to action of the Canadian Patent Office on another interference, which is not offered.

Exhibit 2337 is a letter of transmittal, and I raise these all as objections to the introduction of the letter, but it does not ap- 5879 pear to whom it was transmitted and it is in response to a letter of March 7, 1935, which is not offered; and it refers to a proposal by Eastman, which is not before the Court.

Take GX2851 to which these same objections of completeness apply. Canadian applications and patents are referred to which are not offered.

Take GX2853. Here is a letter from the files of Carbide and Carbon that has not been authenticated and is clearly hearsay as to Du Pont, and it also refers to an interference both in Canada and in the United States which is not offered.

Then there is GX2341, which is a letter discussing a draft agreement, but the draft agreement is not offered.

Then we get to GX2342, and it is another one from the files of Carbide which is not authenticated and which is hearsay, and which refers to two interferences that are not offered in evidence.

Then GX2343 falls into that same group, and in addition refers to a lot of other correspondence that is not offered.

GX2344 is not only not authenticated and hearsay, but it refers to proposed agreements between Hazel-Atlas and Du Pont, and Hazel-Atlas and Carbide, neither of which are offered, and to interferences which are not offered.

5880 Then when we get all through, we have this agreement and we don't know what patents were licensed pursuant to it. We don't know whether the priority determination was appropriate. We don't know the subject matter of the agreement because applications and interferences are not offered. I say that kind of proffer of proof whatever its relevancy, and I think at best, most collateral, is an offer which should not be sustained.

We press those objections.

The Court. May I ask the Government the following question. As I am to test the bona fideness of the defendant's activities throughout these fifteen different interference proceedings, I want you to tell me how the record which is before me in the case of Carbide & Carbon Corporation and the proposed proffer with respect to the other fourteen instances will be sufficient upon which I could make a valid finding in the light of the deficiency of proof as mentioned by Mr. Gesell this morning. I do not particularly wish argument on that point. I am seeking information as to the sufficiency of the record which you propose to make under this phase of the case, for me to find lack of bona fideness on the defendant's part.

Mr. McAuliffe. Your Honor, in presenting this particular phase of the case we are only interested in the agreements which resulted in the settlement of these interferences.

5881 The Court. Well, did you make independent inquiry and investigation to test the validity of those settlements by examining the underlying data upon which they were based? Have you gone through the file wrappers in each of these cases?

Mr. McAuliffe. No, we have not, your Honor. We are not interested in that. We are only interested in the terms of the agreement. We don't care who was prior. That is not material to our point. We are going to show that by these interferences duPont excluded possible competitors from coming into this industry.

Now, we direct our attention to the agreement itself. If you will look at Government Exhibit 2001, you will note that all these interferences were settled between the years 1932 and 1939. I think that is very significant for in all but one of these cases duPont acquired an exclusive right to these patents in the field of cellophane, and these interferences all occurred between those years. This was not a haphazard claim. This was a definite policy on the part of the duPont Company to monopolize the cellophane industry.

The Court. Well now, how can you say that, Mr. McAuliffe, if you have not examined the detail of those proceedings to see what could have been the motivating force to prompt the defendant and the other companies to take the action that they took? I mean, it seems to me that you have looked at one facet of the proceeding and have drawn a conclusion. I think from the 5882 point of view of an advocate, perhaps that may be accepted technique. But from the point of view of the Court, I have got to examine all the factual data because I have got to draw the inference of intent, or to see whether it has been established by all the facts, or whether it has not been established by all the facts. And my difficulty is from the point of view of the judge looking at just the agreement and saying, "Now, I gather from that particular writing that this defendant had an intention to do a certain act or acts," and I do not see why my search, my inquiry should stop by being focused on any particular agreement in contradistinction to seeing everything that went before that agreement when I am not here to determine the legal significance of that agreement as such but to find out what was the intention of the parties.

That is my problem, and the proffer so far from the Government, at least I think at the moment, is not going to be of help to me.

Mr. McAuliffe. We are not interested in the intention of the parties. We are interested in the intent of duPont, and we think that if this had happened once or twice, perhaps that intent could not be realized, but when it happens not once or twice but twelve times, then we think that you can draw what the intent of the duPont Company was in all of these interferences.

The Court. Why should I have to draw it when the facts are available to me if you will bring them forth? I am bothered with the deficiency of proof on this phase of the case, 5883 frankly.

Mr. Minicus. May I make a statement, your Honor?

The Court. Certainly. I would be happy to get as much help as I can.

Mr. Minicus. It might clear the situation up a little bit.

I think we should view this thing in the light of the fact that at the time these agreements had been executed there had been no settlement of interference; it was an interference pending in the Patent Office. No patents had been granted in most of these cases; they were applications pending in the Patent Office that were in interference. Interferences had been declared on them.

Now, nobody at that time knew who was prior. Maybe in the one we had Carbide was prior or maybe duPont was prior. But none of the parties knew it at the time the interference was declared or settled by these agreements. The parties were then up against a gamble. It could have been Carbide that got the entire patent monopoly on this thing or it could have been duPont. So they said, "What will we do? Let's iron this thing out. We won't go through the Patent Office. We will sit down and we will talk this thing over in a business-like fashion." So they did.

We claim that it is more than coincidence, your Honor, that in the settlement of every one of these interferences an 5884 agreement occurred by which duPont got all the rights under any patents that might issue eventually for cellophane and nobody else got any rights in the field of cellophane.

The Court. Did they get any rights at all?

Mr. Minicus. Yes. We will notice as we go through this a continual line of division between fibrous and non-fibrous articles. I submit to your Honor cellophane is non-fibrous. You tear a piece of cellophane and you don't see the little shreds and fibers of it. It is a non-fibrous product. duPont always got exclusive right to use of these patents in relation to non-fibrous products.

The other parties, Carbide here, Eastman Kodak later on, always got the rights to the non-fibrous product, and we say that when that happens time after time, that it is a part of a well-developed scheme and it does illustrate the intent to monopolize.

In addition, these agreements show a well-considered plan to allocate fields of endeavor which are just as illegal per se as the allocation of territorial markets.

The Court. But the point is, I don't have the factual basis as to why that division was made.

Mr. Minicus. I think it is sufficient, your Honor, to know there were applications in interference. The allocation was made because of the interference and because of the fact that duPont lidity of any claim asserted by Eastman Kodak as against the claim asserted in those proceedings by Du Pont? Nothing?

Mr. McAuliffe. Nothing, your Honor. We are not interested in those claims. We are directing our at-

5900 tention again——

The Court. I understand what you are interested in. I am trying to test the validity of the conclusion. I just want to know if there is any basic data whereby I can make such a test.

Mr. McAuliffe. No, your Honor.

Mr. Gesell. I think this would be an appropriate time to state my objections again, your Honor.

The Court. Yes.

Mr. Gesell. Let me say that the situation is exactly as it was in the earlier interference. We don't know what applications were involved; we don't know all the counts in interference. There was another interference involved in this where priority was awarded to Church, and that one is not covered. They take two of the three interferences that grew out of the Patent Office action. The agreement does not show what patents issued; it does not show what applications were involved. We don't know whether the priority was properly determined or not.

5901 In addition, the major subject of this interference, one of them at least, and the one most of the documents relate to, was cellulose acetate, which I had thought was not in this industry on the Government's position rather than cellophane.

Then to run down the exhibits, 2860 does not show the application or the interference discussed. 2862, the same thing, and a new interference is brought in which is not shown. 2347, the interferences are not offered. That is true of 2350. When we get to 2351, there is a detailed discussion of a draft agreement which is not submitted, nor are the interferences offered. The same is true of 2352. In 2356 other applications are discussed, and they are not offered. Though the statement is made that the letter shows duPont's policy of bringing in all the patents it can under its control, there is no showing what the letter is talking about. In 2357 a proposed agreement is discussed, but the proposed agreement is not offered. Interferences and applications are discussed; interferences and applications are not offered.

So my objections are again as they were to the other, of incompleteness of the evidence so as to make it impossible to understand the meanings of the documents offered on this issue of intent and the immateriality and irrelevancy of the whole line of inquiry.

Mr. Minicus. I would just like to answer that briefly for one moment.

5902 **Mr. Gesell.** I am stating objections, not argument.

Mr. Minicus. I might reply, I thought the question about cellulose acetate sounded like an argument. The documents that Mr. McAuliffe read are quite clear. This is a coating. It can be used on cellophane or it can be used on cellulose acetate. Eastman Kodak makes a great deal of cellulose acetate paper. duPont makes a great deal of regenerated cellulose paper or cellophane.

Mr. Gesell. And cellulose acetate.

Mr. Minicus. What do we come up with here, your Honor? We get Eastman getting the rights for cellulose acetate, duPont getting exclusive rights for cellophane. That is all we are trying to prove. We don't care who was prior; we don't care what happened in the Patent Office. We know there was a Patent Office dispute and once again, as in the Carbide case, duPont came out with a nice little package that was cellophane. And that is all we care about.

Now, if our evidence is incomplete, your Honor—and we don't think it is; we certainly think these documents show a prima facie case of that allocation of fields—if our evidence is complete, is this the proper place to attack that or is it a matter for the defense to bring up and show on their defense that there was no allocation of fields here, that duPont did not come up once again with an exclusive right? We say that all we are here to prove is that
5903 duPont came out of this patent dispute once again with another exclusive right for cellophane, through an allocation of fields of business endeavor. That is all we are trying to prove. If we have not proved that, Mr. Gesell can show that duPont didn't have an exclusive right as a result of this patent dispute on the defense.

Mr. Gesell. Now, your Honor, I am glad that this issue has now been put up because I did not think the Government would dare to tender it. There is a sworn affidavit in this Court over Mr. Minicus' signature that a prior proffer of documents on these issues was essential to his case and that not a single document could be removed from this portion of his case because he was at the irreducible minimum, and he has now offered a different and more selected group of documents on these very issues which on his own affidavit he stated to your Honor were essential to his case.

Mr. Minicus. That sounds like I am being accused of fabrication, your Honor. I would like to explain that.

The Court. Don't be so sensitive. If you are correct, why don't you just put the agreements into evidence, if you want to argue that the agreements indicate that Action A, B and C was taken. That is your fact situation. Then from there on you can argue whatever inference you want the Court to gather from those facts.

Mr. Minicus. May I answer you in just a little bit more detail than yes or no?

5904 The Court. Yes, certainly.

Mr. Minicus. We did have a great many documents on this matter. Probably eighteen months ago each agreement was accompanied by 50 or 75 documents, a lot of them. We have been boiling this thing down, your Honor, to that point of just the agreements until now we have four or five or six letters that we think are so descriptive of the intent and purposes of the agreement that we would like to put in just those few selected documents about the agreement.

I will admit that eighteen months ago we looked at this thing quite differently. We thought we would have to put all of those in to support the agreement to show the intent. But as we worked this thing up, as people were assigned to the job, they specialized in it, saw they could cut it down and down and down through the intervening eighteen months, save the Court's time, and get this thing over with as soon as possible. So now we have the agreement with just five or six letters that were written in the course of negotiation to explain certain clauses or for emphasis. We don't believe it is cumulative. I was prepared this morning, your Honor, if you had insisted, just to put the agreement in. But we do think that these few letters that accompany each one of these agreements that we are now putting in do help for an understanding of the agreement.

The Court. All right, proceed.

Mr. McAuliffe. The next interference to be discussed, 5905 your Honor, is Interference No. 72,191. Eastman Kodak Company and duPont were involved in this interference, your Honor.

The Government moves into evidence Government Exhibit No. 2366, which is a memorandum from Mr. L. A. Yerkes to the Executive Committee dated November 23, 1936.

(Memorandum from Mr. Yerkes to Executive Committee dated November 23, 1936, was received in evidence and marked "Government's Exhibit No. 2366.")

Mr. McAuliffe. The subject is "Agreements with Eastman Kodak Company re. Settlement of Patent Interferences Nos. 71,448–71,449–72,191 concerning Moistureproof Cellulose Sheets." I will commence reading at the third paragraph:

"Interference No. 72,191 relates to patent applications covering the use of butyl p-toluene sulfonamide as a plasticizer for cellulose derivatives, and involves Eastman's U. S. Patent Application, Serial No. 728,390, and our Serial No. 24,360.

"Agreement was signed by Eastman under date of May 7, 1936, and by Du Pont Cellophane Company, Inc. under date of June 3, 1936, covering settlement of Interferences Nos. 71,448 and 71,449, by the exchange of appropriate licenses (see letter dated May 22, 1936 to your Committee from Board of Directors of Du Pont Cellophane Company, Inc.).

"From the data and records it appears that du Pont cannot prevail in Interference No. 72,191 and, therefore, Eastman was approached for a settlement. They indicated that 5906 settlement would be agreeable to them, provided we agreed to modification of the agreement covering settlement of Interferences Nos. 71,448 and 71,449.

"Two agreements have accordingly been prepared, as per the enclosed copies, which have been executed by Eastman under date of October 29, 1936, and approved by our Legal Department. One covers modification of our previously executed agreement covering settlement of Interferences Nos. 71,448 and 71,449, and the other relates to settlement of Interference No. 72,191. Recommendation is made for authorization to execute both agreements on behalf of the du Pont Company.

"Under the terms of the earlier agreement covering settlement of Interference Nos. 71,448 and 71,449, licenses from du Pont to Eastman were to enable the use of these coating compositions on cellulose acetate or cellulose acetopropionate only in the case of ester gum-wax moistureproofing coating compositions on a royalty-free basis, with the right to sub-license, while a royalty license was to run for the use of vinyl resin-wax compositions on cellulose acetate only. The modified agreement is designed to broaden these licenses to the extent that Eastman will be able to use the same coating compositions on all organic derivatives of cellulose, other than those which are or can be obtained by precipitation, recovery or coagulation from an aqueous or alkali aqueous solution.

"By this modification, the field in which Eastman may 5907 operate is extended to those cellulose derivatives which must be cast into a film from a solvent medium. Having already licensed them to operate with cellulose acetate, the major field has been given them and we will not be seriously injured by extending this to the other cellulose derivatives. This proposed modification still excludes Eastman from the use of glycol cellulose, cellulose glycollic acid, lowly esterified or etherified celluloses generally, and there will be no change in the licenses du Pont will receive, these to be exclusive as to the regenerated cellulose field and non-exclusive as to the cellulose derivative field.

"The original agreement also provided that licenses would be exchanged between du Pont and Eastman under the claims of dominating patents in the event that either du Pont or Eastman, or both, should prevail as to any of the counts of the interferences.

The modification provides that these licenses under dominating patents will be independent of the outcome of the interference.

"In the original agreement, du Pont was to receive from Eastman the necessary licenses under any of Eastman's dominating patents or applications, while Eastman was entitled to similar licenses under only certain specified du Pont patents or applications. The modified agreement makes this exchange of licenses under dominating patents substantially reciprocal, except
5908 that whereas du Pont is entitled to grant sub-licenses under
its license from Eastman, no such right is granted to Eastman with regard to du Pont patents. In any event, licenses under the dominating patents will be granted only to the extent necessary for the practice of the inventions specifically licensed by the agreement.

"Paragraph 7 in the modification agreement is a new item to the effect that no license privileges will run to either party under any patent for particular cellulose compounds.

"As to Interference No. 72,191, our interest in the particular plasticizer is more or less academic at the moment, but it was felt that we should not forego this opportunity of securing some rights for possible future use.

"In accordance with this proposed agreement, du Pont will receive a royalty-free license with the right to sub-license under any patent that may issue from the Eastman application, this license to be exclusive as to the use of the plasticizer in the manufacture, use and sale of moistureproof sheets of regenerated cellulose or similar cellulosic film which can be obtained by precipitation from aqueous solutions, and non-exclusive as to all other purposes and uses. In the event du Pont secures a patent on its application, Eastman will be granted a royalty-free, non-exclusive license, with the right to sub-license, for all purposes and uses except those which have been reserved for du Pont,
i. e. in the moistureproofing of regenerated cellulose or films
5909 obtainable by precipitation of aqueous solutions.

"By the terms of this agreement, du Pont will have secured practically all the patent protection it could hope to secure if its application were allowed to issue in the absence of this interference. By settling the interference under these terms, du Pont will secure rights which it could not have obtained if the interference had followed normal prosecution, because the information now available indicates a marked priority in favor of the Eastman application."

The Government moves into evidence Government Exhibit 2367, which is the modification of the agreement between Du Pont and Eastman Kodak. I will not read the provisions of this modification.

(Modification of agreement between E. I. du Pont de Nemours & Company and Eastman Kodak Company was received in evidence and marked "Governm... 's Exhibit No. 2367.")

Mr. **McAuliffe.** The Government moves into evidence Government Exhibit 2387, which is the agreement settling Interference No. 72,191.

(Agreement between E. I. du Pont de Nemours & Company and Eastman Kodak Company was received in evidence and marked "Government's Exhibit No. 2387.")

Mr. **McAuliffe.** I will read portions of the exhibit, first from paragraph 2 on page 2906:

5910 "Eastman covenants and agrees to grant and does hereby grant to Du Pont a royalty-free license and also the right to Du Pont to grant sub-licenses to others, without the payment of any additional consideration whatsoever to Eastman, under any and all claims of any patent issuing on the Smith application for United States Letters Patent Serial No. 728,390, or upon any and all divisions, continuations in whole or in part, or renewals thereof or substitutes therefor, for the entire term or terms for which said patent or patents is or are granted, reissued or extended; said license to Du Pont to be exclusive, with the right to grant sub-licenses, with respect to making, using and selling moistureproof sheets, films or foils formed of regenerated cellulose and sheets, films or foils which are obtained or can be obtained by precipitation, recovery or coagulation from an aqueous or alkali-aqueous solution, and non-exclusive as to all other purposes and uses."

I don't believe I gave the date on which this agreement was signed by both parties. This agreement was signed by Du Pont on December 8, 1936, and by Eastman Kodak on October 29, 1936. And as Du Pont expected priority was awarded to Smith of Eastman Kodak, as Government Exhibit 2001 at page 2032 informs us.

That is all with regard to this one.

Mr. **Gesell.** Your Honor, is any purpose served by stating these objections each time?

The **Court.** No.

5911 Mr. **Gesell.** It is the same thing each time.

The **Court.** It will be so understood by the Court.

Mr. **Gesell.** Thank you.

Mr. **McAuliffe.** The next interference which I will discuss is Interference No. 70,341, involving Monsanto and Du Pont.

The Government moves into evidence Government Exhibit 2854, a letter from W. W. Smith to Mr. J. E. Hatt, dated March 1, 1935; subject "Charch v. Jenkins Interference No. 70,341."

(Letter from Mr. Smith to Mr. Hatt dated March 1, 1935, was received in evidence and marked "Government's Exhibit No. 2854.")

Mr. McAuliffe. "We have just received formal notice from the Patent Office advising us of the declaration of the above identified interference involving our Church application U. S. Serial No. 461,840 and U. S. Patent No. 1,960,266 which issued May 29, 1934 to Russell L. Jenkins as assigned to Swann Research, Inc. of Anniston, Alabama. This interference results from our having copied ten claims of the issued patent into our Church application.

"The counts at issue in this interference are perhaps best exemplified by the two broadest claims which are as follows:" I will skip the counts.

5912 "Our Church application Serial No. 461,840 is the Resin-Wax case which relates to moistureproofing compositions comprising a synthetic resin and a wax, useful for the moistureproofing of various base materials including cellulosic bases such as regenerated cellulose. We have disclosed in this Church application three preferred species of resins suitable for the practice of the invention and these include chlorinated diphenyl resins which are referred to in the trade frequently as Aroclor resins. This same Church application is already involved in an interference which turns about the use of vinyl ester resins, another of the preferred species described by Church.

"The Jenkins patent discloses only the chlorinated diphenyl resins and consequently the interference will be limited in scope to this particular species. This patent issued on an application which was filed October 19, 1932.

"Our Church application was filed June 17, 1930 which you will see is two years and four months prior to the filing date of the Jenkins case. Insofar as our own application is concerned, we believe there is considerable possibility that we can carry dates back to December of 1928 if need be, with several possible dates in 1929, on which we can rely, if we are forced to fall back to them. Of course, we are not familiar with the dates that Jenkins can furnish but even though he could allege dates prior to our filing date, there is the long delay of two years before his 5913 filing which he must explain. In other words, we are not only the senior party to this interference as at present advised, but we think also that our position is quite favorable towards a grant of priority."

The Government moves into evidence Government Exhibit 2855, a letter from Herbert J. Krase of Swann Research, Inc., to Mr. William S. Pritchard, dated April 26, 1935, subject: "Interference No. 70341, Church v. Jenkins."

(Letter from Mr. Krase to Mr. Pritchard dated April 26, 1935, was received in evidence and marked "Government's Exhibit No. 2855.")

Mr. McAULIFFE. It reads:

"DEAR SIR: I represent the party Jenkins in the above-entitled interference.

"In order to save the expense likely to be involved in this interference, the assignee of Jenkins is willing to settle this case by agreement, if satisfactory terms can be arranged. I suggest that the attorneys for the parties consider the proofs, determine who is entitled to priority, and the losing party then concede to the winner. The winner will then grant to the loser a royalty-free, non-exclusive license to make, use and sell the invention claimed in the U. S. patent issued or to be issued upon the invention."

The Government moves into evidence Government Exhibit No. 2856, which is a letter from William S. Pritchard to the
5914 Du Pont Cellophane Company, Inc., attention: Mr. F. M. Pralatowski, dated July 5, 1935, subject "Church v. Jenkins Interference No. 70,341."

(Letter from Mr. Pritchard to Du Pont Cellophane Company, Inc., attention: Mr. F. M. Pralatowski, dated July 5, 1935, was received in evidence and marked "Government's Exhibit No. 2856.")

Mr. McAULIFFE. Commence reading at the third paragraph:

"Today I also received a letter from Mr. Krase, Jenkins' attorney, in which he writes that Monsanto Chemical Company of St. Louis state

'they wish to withdraw the offer of settlement which I discussed with you in your office on May 17, 1935, and about which I wrote you on June 21. Please, therefore, consider the offer as withdrawn.

'As you may know, Monsanto has recently acquired control of the Swann companies and, hence, any settlements which we may arrange are subject to the final approval of the Monsanto Company.'

I do not know why Monsanto wishes to withdraw the offer. The terms which we tentatively agreed upon in my office on May 17, 1935 (see my letter of May 22, 1935 to Mr. Hatt) were indeed favorable to Du Pont. Mr. Krase's proposals of June 24, 1935, concerning which I wrote you on June 25, 1935 were not
5915 quite as favorable as the tentative terms originally agreed upon.

"I do not know if the question of settlement is closed or whether Monsanto itself or Mr. Krase will again discuss the question of settlement in the future. 'I wired Mr. Krase that I agreed only to the 60 day extension because of the negotiations for settlement which were in progress. Since the offer has been withdrawn, I further stated, it became unnecessary to have a 60 day extension of time but that I was willing to give them a 30 day extension. I also informed Mr. Krase that I was filing a motion on behalf of Church. This motion is to amend by adding counts and particularly those claims which the Examiner held that Church could not make."

The Government moves into evidence Government Exhibit No. 2378, a memorandum from Mr. L. A. Yerkes to the Executive Committee, dated November 9, 1937, subject "Agreement with Monsanto Chemical Company covering Settlement of Interference No. 70,341 Re. Moistureproofing Coating Compositions Comprising Chlorinated Diphenyl Type Resins."

(Memorandum from L. A. Yerkes to Executive Committee dated November 9, 1937, was received in evidence and marked "Government's Exhibit No. 2378.")

Mr. McAuliffe. "Authorization is recommended to execute the above-mentioned agreement on behalf of du Pont. Copy of the agreement is attached, together with an abstract thereof.

5916 "The agreement was signed by Monsanto on September 17, 1937, and bears the approval of the Legal Department after the latter obtained the assent of other departments of the Company who are also interested in these resins.

"Our experience has not indicated any outstanding value in these resins for our purposes, and there is no reason to believe that we would wish to use them in our moistureproofing coating composition for 'Cellophane' film. We also feel that the likelihood of serious competition on the part of Monsanto or others in the use of chlorinated diphenyl resins in the fibrous field is remote.

"Protection of our general situation surrounding moistureproofing compositions for 'Cellophane' film is the main reason for our desiring to make this settlement with Monsanto, with whom we have been negotiating on the subject for some time.

"We prefer to settle this interference by agreement rather than by prosecution even though our patent position appears to be good. We are the senior party and believe priority will be awarded to us. Despite our efforts before the Board of Appeals, however, we were unable to have several claims included in this interference. By prosecution we cannot secure rights under any claims which are not counts of the interference. By settlement we can secure rights under all of the other claims besides those which we think will be decided in our favor."

Here again we see a manifestation of Du Pont's policy
5917 of acquiring patents to insure its control over the moistureproofing of cellophane.

5918 The Government moves into evidence Government Exhibit No. 2379, which is the agreement settling this interference 70,341. This agreement was signed on November 18, 1937, by Du Pont and on September 17, 1937 by Monsanto.

(The agreement between E. I. du Pont de Nemours & Company and Monsanto Chemical Company was received in evidence and marked, "Government Exhibit No. 2379.")

Mr. McAuliffe. I will commence reading on page 2883, Paragraph No. 4:

"Monsanto hereby grants and by these presents has granted to du Pont a royalty-free license under the Jenkins patent No. 1,960,266 for the entire term or terms for which said patent has been granted or may be reissued or extended, the license being

"(a) Exclusive to du Pont, with the right to du Pont to grant sub-licenses to others, to make, use or sell throughout the United States and its territories, present and future, chlorinated diphenyl resin-wax compositions for coating non-fibrous base cellulosic sheets or films and non-fibrous base cellulosic sheets or films coated with chlorinated diphenyl resin-wax compositions * * *."

The Government now moved into evidence Government Exhibit No. 2915, a copy of which I don't believe you have, your Honor, and I will hand it up. This exhibit is a letter from W. W. Smith, to Mr. F. G. Hess, dated August 12,
5919 1938, subject

"Church v. Jenkins Interference No. 70,341, Du Pont v Monsanto Interference Relating to Moistureproofing Coating Compositions Comprising Chlorinated Diphenyl Resin and Wax."

(The letter from Mr. W. W. Smith to Mr. F. G. Hess, dated August 12, 1938, was received in evidence and marked "Government Exhibit No. 2915.")

Mr. McAuliffe. I commence reading with the second paragraph:

"After due and proper consideration of the proof, the attorneys have agreed that Jenkins is prior to Church as to the counts of the interference, and consequently, it becomes necessary that du Pont takes such steps as are required to terminate the interference. Our attorney, Mr. Pritchard, recommends that this be done by a concession of priority by Church."

The next interference is Interference No. 73,673, involving Goodyear Tire Company and Du Pont.

The Government moves into evidence Government Exhibit No. 2388, a letter from Charles F. Daley, Du Pont Patent Counsel, to Mr. Gordon C. Mack, Patent Department, Goodyear Tire & Rubber Company, dated March 15, 1937, subject "Hershberger v. Gehman v. Gebauer Interference No. 73,673."

(The letter from Charles F. Daley to Mr. Gordon C. Mack, Goodyear Tire & Rubber Company, dated March 15, 1937, was received in evidence and marked, "Government Exhibit No. 2388.")

5920 Mr. McAuliffe. (Reading.)

"Enclosed find an original and first ribbon copy of the revised agreement relative to the settling of the above designated interference between Du Pont and Wingfoot. This agreement has been revised in accordance with the suggestions in Dr. Smith's letter and in accordance with the items discussed between us during our conference here at Buffalo last week."

Skipping the next paragraph:

"Our management still feels that an attempt should be made to settle this interference with Marsene. Although you have had no success in your attempt to bring Marsene into a settlement agreement, we would like the three parties to confer on the matter of settlement. It may be that nothing beneficial will result from such conference, but there is at least a possibility of an amicable settlement among all parties. We suggest that we contact Marsene at an early date and arrange a three party discussion, if Goodyear and Marbo have no objection. I will be glad to have you advise me if Goodyear is willing to sit in at such a conference.

"Paragraph 8, you will note, has been changed to specifically state that Du Pont's exclusive right which also includes the right to grant sublicenses, includes the right to make the moistureproofing compositions specified. This was specifically the intent of the paragraph as originally written, and the addition merely brings the point out more clearly.

5921 "As to articles 8, 9, 10 and 11, in order to remove the objection of Mr. Pralatowski to the effect that the paragraph as originally written covered future inventions, these paragraphs have been amended to tie the claims covered by the licenses to inventions already reduced to practice. I believe that you have no objection to this wording."

The Government moves into evidence Government Exhibit No. 2390, a letter from Mr. W. W. Smith to Mr. Gordon C. Mack, dated November 2, 1939, subject "Hershberger v. Gehman Interference No. 73,673 ('Pliolite'-wax Moistureproofing Coatings)."

(The letter from Mr. W. W. Smith to Mr. Gordon C. Mack, Goodyear Tire & Rubber Company, dated November 2, 1939, was received in evidence and marked, "Government Exhibit No. 2390.")

Mr. McAuliffe. (Reading.)

"We appreciate very much your letter of October 26, 1939 and the effort you have made to set down some possible terms for settlement. In examining your proposals, however, several questions come to mind. Feeling that perhaps we may have misunderstood your proposals, we prefer to discuss these points with you before submitting your proposals to our Management because if these proposals are to be interpreted as we have interpreted them thus far, we feel certain that our Management will raise several objections to them."

Skipping the next paragraph:

5922 "With respect to Item 2, we do not quite understand your retention of a ship right to use wax and Pliolite 'in any way whatsoever'. We should, of course, be willing to grant Goodyear a shop right to use these compositions for application to a variety of surfaces as coating compositions and for numerous uses that are readily conceivable where a melt composition might be employed. There are some uses, however, that would necessarily have to be excluded, such as the readily apparent exception involving the coating of a regenerated cellulose film. An unconditional shop right might involve implied licenses or the like under a variety of patents and an indefinite commitment of this sort would certainly be objectionable.

"With respect to Item 3, we are in general agreement with the proposal except that we believe a more equitable division of rights would suggest that Goodyear receive an exclusive license under the claims of Hershberger with the right to sub-license for the application of the material to fibrous base material. Du Pont would retain an exclusive license for the coating of non-fibrous cellulosic sheet materials which a non-exclusive license would be jointly shared by Goodyear and du Pont for the field of non-fibrous, non-cellulosic materials. Corresponding rights would, of course, be extended under the claims secured by Gehman. These licenses would include also the right to sublicense.

5923 "It is difficult for us to understand the Item 4 in your proposal because it seems that in view of Item 3, Goodyear is agreeable to granting du Pont a certain exclusive license, thus placing in du Pont's hands a certain field to be controlled by du Pont. Your Item 4 seems to strip du Pont of this control. Thus, for example, let us suppose some manufacturer comes to us in order to secure either a Pliolite-wax coating composition or the right to use that in the coating of a regenerated cellulose film.

Obviously, we would be inclined to refuse such a proposition. Do you mean by Item 4 to so arrange the agreement that Goodyear would then have the right to supply that manufacturer? We do not believe that your proposal carries this meaning but with this meaning eliminated, it is not clear just what you have in mind.

"Your Item 5 carries with it a blanket guarantee of immunity with respect to any du Pont patent which might be infringed by the use of a Pliolite-wax coating. Perhaps you meant to temper this by the statement, 'as provided in this agreement' but a commitment of this sort would be so broad and indefinite as to be quite unacceptable. We believe you will recognize quite easily the danger involved in introducing such a broad condition in any settlement agreement and we feel equally certain that you would not wish to so commit Goodyear as to guarantee us immunity from any patent owned by your company which might at some 5924 time be infringed by some one of our customers."

The Government moves into evidence Government Exhibit No. 2393, a letter from W. W. Smith to Mr. Gordon C Mack, dated December 29, 1939, subject "Settlement Agreement Hershberger v. Gehman Interference No. 73,673 ('Pliolite'-wax Moistureproofing Coating)".

(The letter from Mr. W. W. Smith to Mr. Gordon C. Mack, Goodyear Tire & Rubber Company, dated December 29, 1939, was received in evidence and marked, "Government Exhibit No. 2393.")

Mr. McAULIFFE. I commence reading on page 2924, the first full paragraph:

"With reference now to your proposal that Goodyear be given the right to coat any film which Goodyear may manufacture, we consider this as being so indefinite as to be out of the question. It is not the policy of our Company to make such broad indefinite commitments and even though the Management of the Rayon Department might be willing to consider such a proposal, we are sure that it would not meet with the approval of the Officers of our Company who must eventually execute the agreement. In any event, we could not agree to permit Goodyear to coat any film of its own manufacture because we have certain prior commitments and regenerated cellulose film base material, for example, would certainly have to be excluded, together with certain other cellulosic base sheet materials of the non-fibrous 5925 variety. Thus you see that without any specific ideas as to what it is you might wish to coat in the future, we cannot see our way clear to such a broad and indefinite commitment."

Again we see the reference back to the Du Pont-Sylvania moistureproof agreement.

The Government moves into evidence Government Exhibit No. 2394, the agreement settling the interference between Du Pont and Goodyear. This agreement was signed on April 26, 1940, by Goodyear and April 11, 1940 by Du Pont.

(The agreement between Goodyear Tire & Rubber Company and E. I. du Pont de Nemours & Company was received in evidence and marked, "Government Exhibit No. 2394.")

Mr. McAuliffe. I will commence reading at Paragraph 3, page 2929, reading portions of that agreement:

"Wingfoot agrees to grant, and does hereby grant to Du Pont under the aforesaid Gehman application * * * an exclusive royalty-free license, with the exclusive right to sublicense others, to practice the described and claimed inventions of the aforesaid Gehman and Hershberger applications in the field of non-fibrous base materials except natural rubber derivative base materials and casein base materials * * *."

The Court. We will take a mid-morning recess of ten minutes.

(At this point a brief recess was taken.)

5926 Mr. McAuliffe. The next interference which the Government will discuss is Interference No. 68,654 involving Hercules Powder Corporation and Du Pont.

The Government moves into evidence Government Exhibit 2449, a letter from Mr. M. G. Milliken to Mr. L. A. Yerkes, dated January 29, 1936, page 3083.

(The letter from M. G. Milliken to L. A. Yerkes dated January 29, 1936, was received in evidence and marked, "Government Exhibit No. 2449.")

Mr. McAuliffe. (Reading.)

"Dear Mr. Yerkes:

"I wish to thank you for your letter of January 27th advising that you would be willing to arrange to give us and our customers a license to use a Tornesit-wax lacquer coating on fibrous material on the basis of a minimum royalty of ¼¢ per pound on each pound of paper.

It seems to us that this method of computing the royalty might have several objections. One would be that the final point of computation would be so far removed from us that it would be difficult to police the license royalty payments. Then, too, if some one used the Tornesit-wax lacquer on a very heavy cardboard, the royalty based on the Tornesit-wax laquer would appear very high as compared to an application where the paper was thin and of light weight.

"Knowing of the great stake which you have in cello-5927 phane, it would seem to me that you would be particularly anxious to protect your situation on thin papers but not be concerned much about the application of a moistureproof coating to pulp board or similar materials. It would be much easier from our point of view to collect a few cents per pound from our customers on the Tornesit used in a lacquer for coating on fibrous materials."

The Government moves into evidence Government Exhibit 2453 at page 3090, a letter from Mr. L. A. Yerkes to Mr. M. G. Milliken dated April 10, 1936.

(The letter from L. A. Yerkes to M. G. Milliken dated April 10, 1936, was received in evidence and marked, "Government Exhibit No. 2453.")

Mr. McAuliffe. (Reading.)

"I am sorry that we have been so long in definitely answering your letter of January 29th. . . .

"We would be willing to grant your company a license under the Church & Prindle patent #1,826,699 to permit your company and its customers to utilize the method of said patent only for treating fibrous materials with chlorinated rubber-wax compositions and not otherwise, provided the Collins (Du Pont) v. Shankweiler (Hercules) interference No. 68,654 is settled upon mutually satisfactory term and provided also your company pays a royalty of 4% based on the selling price of 'Tornesit' lacquer. In
5928 no event, however, is the royalty to be less than 2 cents per pound of 'Tornesit' lacquer. The royalty is to be paid quarterly by Hercules and a quarterly accounting rendered.

"As to the procedure for licensing your company's customers, Du Pont is willing to give your company the right to grant licenses to its customers, provided that the licenses which Hercules grants are in the form approved by Du Pont and also provided Hercules promptly furnishes Du Pont a copy of each of the licenses granted by Hercules.

"If this is satisfactory, please advise me and I will instruct our attorneys to prepare a formal written license."

The Government moves into evidence Government Exhibit No. 2460, a letter from F. M. Symmes of the Patent Division of the Legal Department of Hercules Powder Company to Busser and Harding, their outside attorneys.

Mr. Gesell. This is one we have an authenticity objection to, your Honor, among others.

(The letter from F. M. Symmes to Busser and Harding dated June 25, 1936, was received in evidence and marked "Government Exhibit No. 2460.")

Mr. McAuliffe. (Reading.)

"On June 23, 1936 Mr. Levin, of Mr. Pritchard's office, conferred with Mr. Graves about the two contracts.

"Regarding the interference license contract, Mr. Levin
took the stand that such was settled and not be dis-
5929 cussed further, altho duPont Cellophane had not then
executed the same.

"Mr. Levin revised our broader, royalty-bearing contract in various ways, for example:

"(1) To include only three Church & Prindle patents, instead of 5. We had asked for more than necessary, and we agree to the reduction.

"(2) A paragraph wholly unacceptable to Hercules as follows:

'Hercules covenants and agrees that it will not issue any licenses to any of its customers except of a standard form, which standard form must be approved by duPont in writing prior to the issuance of any licenses; Hercules agrees to submit to duPont 10 days prior to the granting of any license the name of the proposed licensee, its address, and the nature of its business, in order that duPont may object to the issuance of said license if, in duPont's opinion said license will interfere with the business of duPont; Hercules agrees to furnish duPont promptly after execution a copy of any license; Hercules agrees that the standard form of license will contain a cancellation clause which will permit Hercules to cancel said license in the event licensee breaches any of the covenants and
agreements thereof, and Hercules covenants and agrees that
5930 it will cancel said license upon duPont calling to its atten-
tion the fact that said license is being breached.'

"(3) Hercules was to agree to show the names and addresses of its customers in its separate books of account, accessible to a duly accredited representative of duPont.

"(4) Hercules was to agree not (ever) to dispute the validity of the Church & Prindle patents.

"(5) If the agreement were cancelled, the obligation not to dispute validity remained in effect.

"Mr. Levin retired to redraw the contract in a manner acceptable to Hercules, but evidently he will have the two agreements executed simultaneously.

"After due acquaintance with Mr. Levin, we are inclined not to take too much for granted in the matter of concessions by us until the ink is dry on the paper. This answers your question."

5931 The Government moves into evidence Government Exhibit No. 2462, which is the agreement settling this interference, signed by Du Pont on August 3, 1936 and by Hercules on August 11, 1936.

(Agreement between E. I. du Pont de Nemours & Company and Hercules Powder Company was received in evidence and marked "Government's Exhibit No. 2462.")

Mr. McAuliffe. I will read portions of paragraph 2 on page 3107:

"Hercules hereby grants to Du Pont an exclusive royalty-free license, with the exclusive right to grant sub-licenses without the payment of any further consideration whatsoever to Hercules, to make and use the invention or inventions and sell the product or products and license others to make and use the invention or inventions and sell the product or products disclosed in applications for United States Letters Patent Serial Nos. 590,996 and 739,470, or in any and all divisions, continuations in whole or in part, or renewals thereof, or substitutes therefor, and under and in accordance with any and all Letters Patent of the United States which may issue on said applications for the entire term or terms for which said Letters Patent is or are granted, reissued or extended, the license being restricted and the sub-licenses to be restricted to non-fibrous bases treated with chlorinated rubber-wax compositions only and not otherwise."

5932 The Government moves into evidence Government Exhibit 2848, a letter from Mr. Pritchard to Busser and Harding dated August 21, 1936.

(Letter from Mr. Pritchard to Busser and Harding dated August 21, 1936, was received in evidence and marked "Government's Exhibit No. 2848.")

Mr. Gesell. Wait a minute now. There is a companion agreement to that agreement that I thought you were going to offer. I object to the first one. Aren't you going to offer the next, 2463, which is the companion agreement? That is what the correspondence is about. It is about 2463.

Mr. McAuliffe. At Mr. Gesell's insistence, we will offer Government Exhibit 2463——

Mr. Gesell. That is putting words in my mouth.

Mr. McAuliffe. Which is a license agreement dated February 2, 1937.

(License agreement between E. I. duPont de Nemours & Company and Hercules Powder Company dated February 2, 1937, was received in evidence and marked "Government's Exhibit No. 2463.")

Mr. McAuliffe. In this agreement duPont licensed Hercules under certain of Charch and Craigue patents. This license was restricted to the use of fibrous materials, as can be seen in paragraph 3 on page 3112 and paragraph designated 1, on page 5933 3113, where the patents, it is stated, can be used for only treating fibrous materials. In paragraph 6, on page 3116, Hercules agrees to admit the validity of those patents.

That finishes my discussion of this interference.

The COURT. And the other companies noted in your index will not be discussed? I have marked that you have covered the interferences with respect to Carbide & Carbon Corporation, Eastman Kodak——

Mr. McAULIFFE. That finishes my discussion of that interference.

The COURT. I thought you had finished the whole section.

Mr. McAULIFFE. No, your Honor.

It has been called to my attention, your Honor, that you said I have not discussed the Carbide & Carbon interference. I believe that was the first——

The COURT. No, I am misquoted if I said that. I said you had covered the following, Carbide & Carbon Corporation, Eastman Kodak, Monsanto, Eastman Kodak again, Goodyear, Hercules Powder, and I am not sure about Rosenberg.

Mr. McAULIFFE. That interference was discussed by Mr. Minicus.

The COURT. Proceed.

Mr. McAULIFFE. The next interference which I would like to discuss is Interference No. 71,566, involving Marbo Corporation and Du Pont. The Government offers into evidence
5934 Government Exhibit 2396.

(Unsigned memorandum dated June 25, 1935, was received in evidence and marked "Government's Exhibit No. 2396.")

Mr. McAULIFFE. "Mr. F. B. Davis, President of the U. S. Rubber Company, called on Mr. Yerkes this date, to discuss the negotiations between U. S. Rubber and the Marsene Company. Mr. Yerkes reported on his talk with Mr. Davis to Messrs. May, Horsey and Leach, as follows:

"U. S. Rubber were about to conclude an agreement with Marsene but when Horsey"—he is the director of the Du Pont Development Division—"sprung the du Pont Company patent position on them they put off signing the agreement. This agreement would have given U. S. Rubber two-fifths of the stock in the new Company, and the present owners three-fifths; U. S. Rubber not to put up any money but patents to be pooled. (U. S. Rubber would have the right to sell stock under the proposed agreement.) The new company would have had the right to do anything they wanted—in other words, they could make sheeting, coat any products they desired, use their process for the base of certain paints and lacquers, plastics, etc. Incidentally, that is the Hercules interest in it—from the plastic standpoint.

"Under this agreement the Cellophane Company would have been protected to the extent that we would have had the right to buy rubber hydrochloride from U. S. Rubber for any use that we

wanted to put it to, the purchase carrying with it a
5935 license under these pooled patents.

"The agreement has been temporarily held up, and Mr. Davis is going to communicate with Mr. George Dryden, a stockholder and director in Borg-Warner and the Marsene Company. (Mr. Dryden married a niece of George Eastman. He is a personal friend of Mr. Davis.) Mr. Davis will tell Dryden that the Du Pont Company have a patent position in this thing and this fact to some extent changes the whole picture. Mr. Davis asked Mr. Yerkes if that was all right, and Mr. Yerkes saw no objection. Davis' present idea is that he should tell Dryden that he has just discovered that du Pont have a patent position and that negotiations will have to be more or less started over again.

"Mr. Yerkes said he thought a happy solution of this thing would be to have the Marsene Company take everything concerning rubber hydrochloride except sheeting and the coating of sheeting, and give Du Pont Cellophane Company sheeting and the coating of sheeting. Davis seemed doubtful about that, and Mr. Yerkes agreed that probably Marsene would not agree to it.

"Mr. Yerkes then said that if Marsene would not agree to the above, it seemed to him it would be foolish for two companies, namely Du Pont Cellophane and Marsene, to go into the manufacture of sheeting or the coating of sheeting; that it would be better for only one company to go in, and obviously much better
for Du Pont Cellophane, with its established manu-
5936 facturing and sales facilities, than Marsene. Mr. Davis
agreed and thought that probably Mr. Dryden would think that was proper too, rather than start a new company against an old established one. Mr. Yerkes suggested we might even go so far as to consider the payment of something to Marsene for exclusive rights for sheeting and the coating of sheeting, and give Marsene rights to everything else.

"Goodyear, according to Mr. Davis, are also in the picture and have been told U. S. Rubber apparently have a strong patent position. (Incidentally, Davis said they themselves did not feel they had a strong patent position.) Marsene are definitely opposed to having Goodyear in the picture in any way. They told Davis that if he did not sign this agreement today and leave Goodyear out they were going along in their own. That of course has been changed by the interjection of our patent position, but apparently Marsene are definitely opposed to having Goodyear in the picture.

"The program now is—first, to leave Goodyear out for the time being and try to get an agreement between Dryden, representing Marsene, and U. S. Rubber, bringing us in on the sheeting end of the picture. (Mr. Yerkes doesn't think there is much chance of this unless we are willing to pay something to keep Marsene out of the sheeting and coating end.) The second choice would be that they make the sheeting and reserve the right to make 5937 the coating to us. The worst that could happen would be for them to go ahead and form the company as planned, we to get the license to purchase hydrochloride from them.

"Mr. Davis did not know what the uses outside of sheeting and coating would amount to.

"In reply to a question of Mr. Horsey, Mr. Yerkes advised we should go ahead with the interference."

The Government moves into evidence Government Exhibit 2870, a letter from Mr. Lloyd L. Leach, of the Development Division, to Mr. F. M. Pralatowski, "Subject: Rubber Hydrochloride Film."

(Letter from Mr. Leach to Mr. Pralatowski dated September 18, 1935, was received in evidence and marked "Government's Exhibit No. 2870.")

Mr. McAuliffe. That appears at page 6173 and is dated September 18, 1935.

Mr. Minicus. May I have a moment with my associate if your Honor please?

The Court. Yes.

Mr. McAuliffe. Your Honor, the sole purpose for the introduction of this interference is to present the problems involved relative to the coating of sheeting.

Mr. Gesell. Even though it relates to one of the substitute flexible materials, your Honor.

The Court. Well, it is hard to stop that factor from 5938 creeping into the case. I have tried my best to keep it out.

Mr. Gesell. The reason it is hard, your Honor, is that it is the case. You can't avoid it.

The Court. Go on, Mr. McAuliffe.

Mr McAuliffe. As I tried to point out, duPont is not only concerned with the sheeting, but the coating of sheeting, and it is the coating of sheeting which I would like your Honor to direct your attention to.

Mr. Gesell. Is that the coating of rubber hydrochloride sheeting or the coating of some other sheeting, cellulose acetate sheeting? What kind of sheeting?

Mr. McAuliffe. The exhibit just read speaks only of the coating of sheeting.

Mr. Gesell. Rubber hydrochloride?

Mr. McAuliffe. It doesn't say. It is very possible that this coating could be used on cellophane. And it is as a result of that possibility that we are introducing this interference. They don't say for what purpose this coating could be used.

Commence reading Government Exhibit 2870:

"The U. S. Rubber Company now advises us that a new corporation has been formed to administer certain patents in the field of rubber hydrochloride products. The new corporation is owned jointly by Marbo Products Company of Chicago and the U. S. Rubber Company. The percentages of ownership are 5939 unknown to us. The patents which we understand constitute the assets of this new corporation are those issued to the Naugatuck Chemical Company #1,519,659 and #1,627,725 and that issued to the Marsene Corporation #1,980,396.

"Mr. Roberts and Mr. Smith, vice-president and assistant respectively of the U. S. Rubber Company and director and vice-president respectively of the newly formed corporation have approached us as intermediaries for that corporation with the request that we have our patent attorney discuss with theirs our relative position with a view to clearing the atmosphere and making whatever arrangement may be necessary to permit the newly formed corporation to begin its activities. It appears that these activities will be the manufacture of rubber hydrochloride for a number of purposes such as cable covering, painting, molding and film manufacture. The new corpoation has granted licenses both to Marbo Products Company and to U. S. Rubber Company to manufacture rubber hydrochloride under the patents referred to and also to manufacture rubber hydrochloride film under these patents.

"We have indicated to the gentlemen mentioned that for the present we would prefer not to discuss our patent position since it is based upon an application still in the Office whereas theirs presumably is based upon an issued patent."

The Government moves into evidence Government Exhibit No. 2408 appearing at page 2989. This is a letter from R. M. 5940 Horsey to Mr. E. K. Gladding dated November 15, 1935, "Subject: Rubber Hydrochloride Film—Marbo Patents, Inc."

(Letter from Mr. Horsey to Mr. Gladding dated November 15, 1935, was received in evidence and marked, "Government's Exhibit No. 2408.")

Mr. McAuliffe. Commence reading at the second paragraph:

"On October 10th Wilmington received notice of the declaration of interference No. 71,566. Subsequently we were approached by the U. S. Rubber Co. with a request to meet them and discuss our relative patent positions. We indicated that it seemed to us proper and desirable that any such discussion should be with the representatives of the company which was lately formed to hold and control the patents in question.

"Mr. F. B. Davis also communicated with Mr. Yerkes along the same lines as other members of the U. S. Rubber Co. expressed themselves to us. Mr. Yerkes concurred with our thought, above stated, and so expressed himself to Mr. Davis. As a result a meeting was arranged at the U. S. Rubber Company's offices at which were present Messrs. Roberts and Smith of the U. S. Rubber Co., and W. P. Hemphill and H. A. Winkleman, President and Vice President respectively of Marbo Patents, Inc. Mr. Levy, Patent Counsel of U. S. Rubber Co., was later called in to the meeting. Our Company was represented by Mr. Leach and the writer.

5941 "Mr. Roberts proposed, as a basis of discussion, that the interference action be dissolved and an agreement be made that Marbo Patents, Inc., take the rubber claims of the Marsene patent and Du Pont take the butadiene claims, both parties then to proceed with their developments in these separated fields.

"He felt that Du Pont was not interested in the rubber claims because all of the claims cited in the interference action had to do with butadiene rather than with rubber."

5942 Skipping along to page 2991, second paragraph:

"In the course of the discussion, Mr. Roberts reiterated his previous statement that it was U. S. Rubber's intention to exercise their rights under the license granted them to manufacture film under the patents of Marbo Patents, Inc., only in cooperation with Du Pont. He mentioned that from their point of view Du Pont was the logical organization to make and sell any such film. We inquired whether Marbo Patents, Inc., felt the same way about film manufacture. Mr. Hemphill's answer to this, briefly summarized, was that Marbo Patents, Inc., desired of course to obtain as much revenue as possible from royalties on the patents they own, and profits on the products which might be made under them.

"Mr. Roberts inquired as to what Du Pont wanted from the Marbo group and also what Du Pont hoped to gain by the prosecution of its interference action against the Marsene patent. The writer made it clear to Mr. Roberts and the members of the Marbo organization that through the interference action Du Pont expected to dominate the Gebauer-Fuelnegg patent and that they would not be able to operate under their specific rubber claims without a license from Du Pont under its broad claims. The writer stated that a settlement might be effected if Du Pont were given exclusive rights under Marbo's rubber claims with respect to the manufacture of films, sheeting, etc., Marbo retaining
5943 rights for rubber hydrochloride as relating to other materials such as paints, etc. We stated that such a settlement would be subject to the consideration of our parent company because of the possible interest of some other branches of the du Pont Company in fields other than films. We offered this, however, as a basis for discussion and consideration.

"This proposal was regarded as unreasonable by the other side and the writer then suggested that we table the matter and proceed with the interference action. This proposal was not acceptable as the Marbo group desires to have the question settled so that they can proceed with their plans. From our point of view, however, they are not willing to concede anything to Du Pont in consideration for Du Pont's patent position as well as its skill and experience in the manufacture of films and sheeting.

"We stated that Du Pont would be willing to consider any proposal that the Marbo group might wish to make. The following proposition was suggested and will be based on the dissolving of the present interference and completing an agreement whereby Marbo Patents, Inc. would concede all of the broad claims in the Marsene patent to Du Pont. Du Pont would concede the specific claims relative to rubber to Marbo Patents, Inc. Marbo Patents, Inc., would then give Du Pont a license under the remaining part of the Marsene patent.

"Analyzing the proposal, the concession by Du Pont
5944 would be royalty free. Marbo would give Du Pont a non-
exclusive license under patents permitting Du Pont to manufacture rubber hydrochloride film. This would carry a royalty. It was pointed out by us that such an arrangement would give Du Pont no consideration for dissolving the interference, etc.

"It was then proposed that the Marbo group submit a proposition for Du Pont's consideration which would be based on granting Du Pont an exclusive license under Marbo-held patents relating to rubber hydrochloride film manufacture. Marbo will include in such proposal a provision whereby Du Pont will be required to guarantee a minimum annual return to Marbo."

The COURT. Recess to 2:15.

(At this point a recess was taken until 2:15 o'clock, P. M., the same day.)

2:15 O'CLOCK, P. M., THE SAME DAY.

Present: As before noted.

Mr. McAULIFFE. If your Honor will recall, before the recess I was talking about the interference involving Marbo and Du Pont,
Interference No. 71,566. The Government was directing
5945 your attention to the fact that the counts in the interference
were directed to the coating of cellophane as well as other things. That this interference does relate to cellophane is conclusively proven by the fact that it is noted as one of the Du Pont interferences in Government Exhibit 2001, which is Du Pont's answer to our interrogatories.

The Government moves into evidence Government Exhibit 2418 appearing at page 3008, which is the agreement settling this interference involving Marbo and Du Pont.

(The agreement between Marbo Patents, Inc. and E. I. du Pont de Nemours & Company dated April 8, 1936, was received in evidence and marked, "Government Exhibit No. 2418.")

Mr. McAuliffe. ~~I direct the~~ Court's attention to page 3009 ~~and to~~ Paragraph 2:

"Regardless of the decision as to priority, Marbo will grant to Du Pont an exclusive, assignable, royalty-free license to practice the process and to make, use and/or sell the products covered in the counts of said interference, said license to Du Pont, however, excluding natural rubber hydrohalide and said license including the right to sub-license others.

"The license granted above shall extend to the claim or claims of any patent now owned or controlled by Marbo or granted on an application now owned or controlled by Marbo, dominating a proc-
ess or product covered by the said counts and licensed to Du
5946 Pont above, but only to the extent necessary to permit Du
Pont to practice any process or make, use and sell any product covered by said counts and licensed to it above."

I would also like to call the Court's attention to the first complete paragraph on page 3011:

"Marbo further agrees that so far as it is able, it will extend to Du Pont similar licenses under any further patents which it may obtain in the field of self-sustaining films and coatings for any type of self-sustaining films, provided, however, that in the event Marbo purchases any patents Du Pont shall be obliged to pay a royalty to be agreed upon for the use of such patents it being understood that Du Pont may elect not to have its license extend to such purchased patents."

The Government moves into evidence Government Exhibit No. 2422, which is a license agreement wherein Marbo licensed Du Pont exclusively as provided in the agreement settling the interference, the agreement appearing in Government Exhibit 2418.

(The license agreement between Marbo Patents, Inc. and E. I. du Pont de Nemours & Company dated April 3, 1941, was received in evidence and marked, "Government Exhibit No. 2422.")

Mr. McAuliffe. In this license Du Pont obtains an exclusive
license, and Marbo, on page 3032, again "further agrees that
5947 so far as it is able, it will extend to Du Pont similar licenses
under any further patents which it may obtain in the field of self-sustaining films and coatings for any type of self-sustaining films, provided, however, that in the event Marbo purchases any patents, Du Pont shall be obliged to pay a royalty to be agreed upon for the use of such patents, it being understood that Du Pont may elect not to have its license extend to such purchased patents."

5948 Now, your Honor, the agreements which we have just reviewed conclude the agreements which relate to the moistureproofing of cellophane. The agreements which we are about to discuss relate to incidents not involving the coating of cellophane and will show the prevalence of the practice which Du Pont engaged in in the settling of interferences relative to moistureproof coating.

The Government is about to discuss Interference No. 74,629, involving Aluminum Corporation of America and Du Pont.

The Government offers into evidence Government Exhibit 2865, appearing at page 6464. This is a letter from W. W. Smith to Mr. S. E. Low, Patent Counsel, Aluminum Company of America, dated September 7, 1937. The subject is "Chylinski v. Laing Interference No. 74,629."

(Letter from W. W. Smith to S. E. Low dated September 7, 1937, was received in evidence and marked "Government's Exhibit No. 2865.")

Mr. McAuliffe. "Dear Sir:

"We have been advised recently by the Patent Office of the declaration of the above-identified interference involving our respective applications.

"As you may know, the subject matter of this interference was the subject of correspondence and discussion with Mr. W. D. 5949 Keith of your Company during June and July of 1936. At that time, the possibilities of an interference were mentioned but it was left to the future to determine what would be done in the event of such an occurrence.

"As is doubtless true in your own Company experience, we are always willing to entertain the idea of settling an interference. The subject matter of this interference is of such a character that we believe it would be worth while for us to consider the possibilities of settlement by a suitable exchange of licenses thus avoiding the necessity of carrying the interference through an orderly prosecution. We shall be pleased to discuss this at your convenience either at New Kensington or at Buffalo if the general idea of a settlement of this interference is attractive to you.

"In line with this and with the thought of saving a little time, we would like to suggest some terms of settlement which may serve as a starting point. We solicit your views in connection therewith. First of all, of course, we could agree to have our attorneys consider the counts of the interference, including any new ones which might be properly added, with the attorneys eventually attempting to decide priority, agreeing to carry the question of priority through the decision of the Patent Office in the event that the attorneys cannot decide. As to the grants, perhaps something on the order of the following would be possible:

“Aluminum Company agrees to grant to du Pont an
5950 exclusive, royalty-free license to operate under the counts of the interference, and a non-exclusive royalty-free license under any claims granted to Laing U. S. Serial No. —— necessary to practice the said exclusive license, in the manufacture, use, and sale of regenerated cellulose pellicles, said licenses carrying the right to sub-license others.

“Du Pont agrees to grant to Aluminum Company an exclusive, royalty-free license to operate under the counts of the interference, and a non-exclusive royalty-free license under any claims granted to Chylinski U. S. Serial No. —— necessary to practice the said exclusive license, in the manufacture, use, and sale of nonfibrous cellulosic pellicles other than regenerated cellulose pellicles, said licensee carrying the right to sublicense others.”

The Government moves into evidence Government Exhibit 2317 appearing at page 2692. This is the agreement settling this interference involving Aluminum Company of America and Du Pont.

(Agreement between E. I. du Pont de Nemours & Company and Aluminum Company of America dated March 10, 1938, was received in evidence and marked “Government's Exhibit No. 2317.”)

Mr. McAuliffe. The Government directs the Court's attention to page 2694, paragraph 3:

5951 “Aluminum agrees to grant, and does hereby grant, to Du Pont an exclusive royalty-free license to make, use, and sell, and to license others to make, use, and sell, the inventions covered by the claims of the said Laing application which are directed to subject matter common to that application and the said Chylinski application and including the claims which constitute counts of said Interference, and a non-exclusive, royalty free license to make, use and sell, and to license others to make, use, and sell inventions covered by any claims finally granted in the said Laing application, which claims are not directed to subject matter common to that application and the said Chylinski application and which do not constitute counts of the said Interference; provided that all licenses granted under this Article shall be, and hereby are, limited to the manufacture, use, and sale of regenerated cellulose pellicles.”

Now the Government will discuss Interference No. 74,837 involving American Can Co. and duPont. The Government offers into evidence Government Exhibit 2867, a letter from W. W. Smith to J. E. Hatt dated October 11, 1937. The subject is “Allen v. Magill Interference No. 74,837.”

(Letter from W. W. Smith to J. E. Hatt dated October 11, 1937, was received in evidence and marked “Government's Exhibit No. 2867.”)

5952 Mr. McAuliffe. "The above-identified interference was set up on September 29, 1937, involving our Allen application, Serial No. 720,927 and Magill Patent U. S. No. 2,085,034, issued June 29, 1937, as assigned to the American Can Company.

"Our Allen application relates to the process of manufacturing containers for holding oil, grease and similar products, the container being a convolutely wound paper tube having a Cellophane lining member arranged inside the tube to prevent seepage of oil past the edges of the liner into the fibrous body of the container. For some time, we had prosecuted claims for the process of making such a container but after having had such claims finally rejected, we proposed to accept the allowance of a few very narrow minor claims in order to bring the application to issue. We were very much surprised to observe the issue of Magill Patent No. 2,085,034 with precisely the same kind of claims we had been prosecuting unsuccessfully in our Allen application. Accordingly, we arranged to copy into our Allen application a number of the claims which had issued in the Magill patent, requesting the Patent Examiner to declare the interference. For convenience, we quote one of the counts of the interference:"

I will not read the count.

"The Magill patent issued from an application filed November 13, 1935. Our Allen application was filed April 17, 1934, thus making us the senior party by about nineteen months. Mr. Allen made his invention in January 1932 and during the
5953 interval between his conception and the ~~filing date~~ of our
application, he diligently tried to find some practical means of reducing his invention to practice although he had demonstrated to others the way in which it could be done shortly after he had thought of the idea.. There is considerable reason to believe, therefore, that we can win this interference without much difficulty.

"In the absence of any adverse comment, we propose to follow this interference in an orderly fashion, at least up through the preliminary stages during which time the expense is small. If and when we arrive at a testimony stage, we will discuss the status of the case with you before proceeding to this more expensive phase of the interference."

5954 The Government moves into evidence Government Exhibit 2868, a memorandum written by Mr. W. W. Smith dated March 14, 1938, subject "Settlement Agreement-Allen vs. Magill, Interference No. 74,837."

(The memorandum written by W. W. Smith dated March 14, 1938, was received in evidence and marked, "Government Exhibit No. 2868.")

Mr. McAuliffe. I commence reading the third paragraph:

"Shortly after the declaration of the interference, we were approached by American Can Company with the idea of settling. At our suggestion, the terms outlined below were proposed and it now appears that a settlement agreement on this basis will result."

The Government moves into evidence Government Exhibit No. 2326 appearing at page 2715. This is an agreement settling the interference between American Can and Du Pont.

(The agreement between American Can Company and E. I. du Pont de Nemours & Company was received in evidence and marked, "Government Exhibit No. 2326.")

Mr. McAuliffe. The Government draws the Court's attention to page 2720, paragraph No. 3:

"(1) Canco hereby grants and by these presents has granted to
Du Pont a royalty-free license under claim 12 of the Magill
5955 patent No. 2,085,034 for the entire term or terms for which
said Magill patent has been granted or may be reissued or
extended, the license being more specifically as follows:

"(a) Exclusive to Du Pont, with the right to Du Pont to grant sub-licenses to others, to use and practice the process covered by said claim 12 of said Magill patent when non-fibrous cellulosic sheet material is used as the lining member for the container, and to sell the product resulting from said process, throughout the United States and its territories, present and future;"

This interference was won by American Can Company.

The Government moves into evidence Government Exhibit 2869, a memorandum from L. A. Yerkes to the Executive Committee dated April 28, 1939. The fourth paragraph of this exhibit so informs us.

(The memorandum from L. A. Yerkes to the Executive Committee dated April 28, 1939, was received in evidence and marked, "Government Exhibit No. 2869.")

Mr. McAuliffe. The Government moves into evidence Government Exhibit No. 2332 appearing at page 2749. This is the revised agreement in which American Can gave Du Pont an exclusive license for the use of its patent on non-fibrous cellulose sheet material as provided for in the agreement appearing in Government Exhibit 2326.

(The revised agreement between American Can Company
5956 and E. I. du Pont de Nemours & Company was received
in evidence and marked, "Government Exhibit No. 2332.")

Mr. McAuliffe. The next interference to be discussed is Interference No. 63,558 involving A. G. Spaulding and Du Pont. This is the interference, if your Honor will recall, that Mr. Gesell spoke about this morning. The Government admits that it involves a very insignificant point, but we also think that it only goes to show how far Du Pont would go.

The Government moves into evidence Government Exhibit 2846, a letter from G. F. Goodyear to J. E. Hatt dated September 17, 1934.

(The letter from G. F. Goodyear to J. E. Hatt dated September 17, 1934, was received in evidence and marked, "Government Exhibit No. 2846.")

Mr. McAuliffe. The subject of this letter is "Salley Serial No. 490,571."

(Reading.) "We are pleased to advise that the above entitled application was allowed on September 7, 1934 with eight claims of which Claim 38 is regarded as typical and is quoted as follows:"

Skipping the claim:

"The inventive concept in this application is the application of
a seamless tube of regenerated cellulose to golf club handles
5957 and the like to protect them from dirt and handling by cus-
tomers. The tube shrinks in the same manner as bottle caps.

"This application was originally filed by us in view of some activity by A. G. Spalding & Bros. and we got into interference with an application of theirs which we finally won by their conceding priority to us in return for our giving them a license.

"We believe that the final fee should be paid and this application allowed to issue in due course. In the absence of adverse comment on or before September 27, 1934, we shall assume that this recommendation is acceptable and inform the Patent Board of the Parent Company accordingly."

The Government moves into evidence Government Exhibit No. 2311, which is the concession of priority by A. G. Spaulding to Du Pont.

(The concession of priority by A. G. Spaulding to Du Pont was received in evidence and marked, "Government Exhibit No. 2311.")

Mr. McAuliffe. The Government moves into evidence Government Exhibit 2312, which is the license agreement between Du Pont Cellophane Company, Inc. and A. G. Spalding in which Du Pont granted Spaulding an exclusive license to use and sell and license others to use and sell protective coverings for the grip on golf clubs for the entire term or terms for which letters patent
of the United States may be issued or reissued on
5958 application Serial No. 490,571. Du Pont in this license
agreement expressly reserved to itself the exclusive rights to make the said protective coverings and to sell the same to Spaulding.

(The license agreement between Du Pont Cellophane Company and A. G. Spaulding was received in evidence and marked, "Government Exhibit No. 2312.")

Mr. McAuliffe. The last interference which I would like to discuss is Interference No. 68,197.

The agreement settling this interference appears in Government Exhibit 2382, which the Government now moves into evidence. This agreement was signed on June 4, 1935.

(The agreement between E. I. du Pont de Nemours & Company and Eastman Kodak Company, dated June 4, 1935 was received in evidence and marked, "Government Exhibit No. 2382.")

Mr. McAuliffe. The Government directs your Honor's attention to Paragraph No. 4 on page 3 or page 2894:

"Eastman agrees to grant and does hereby grant to Du Pont and the subsidiary companies, present and future, of Du Pont, royalty-free, irrevocable, non-exclusive license under the claims of the above identified Murray and Kenyon U. S. Patent 1,946,635, and Smith U. S. Patent 1,901,130 and any reissue of either of said patents."

This is the only interference agreement in which Du Pont obtained a non-exclusive license.

Mr. Gesell. Of the ones you have chosen to discuss, 5959 you mean, don't you?

Your Honor understands that this discussion is limited to a small number of the total.

The Court. Of Du Pont interferences?

Mr. Gesell. That were settled, yes. There were some 39 settled, some in the Patent Office, some by agreement.

Mr. McAuliffe. These agreements which I have discussed are all of the agreements which were settled outside the Patent Office.

Mr. Gesell. No, sir.

Mr. Minicus. I think this can be cleared up, your Honor. We have attempted to discuss here completely all of the interferences that were settled by agreement. That is our reason for putting in the last one which does not give Du Pont exclusive rights. That is the only one we found. There are some other interferences which were settled by agreement. There is the Rosenberg interference and then there are certain interferences involving caps and bands and cellophane. Those are with Celon and Sylvania. They will be discussed in the next section which will concern Celon and Sylvania. To the best of our ability we believe we have been successful and we have put in here every interference that was settled by agreement except the Rosenberg interference and certain interferences involving Celon and Sylvania which are to be discussed in the next section.

5960 Mr. Gesell. That is not the fact, your Honor. The exhibit shows there are two others that relate to cellophane that are not present: One to the Anacin Company and the other to International Paper.

The COURT. Going back to Interference 68,197, in your index you have coupled that with interference 68,801.

Mr. MCAULIFFE. That is true, your Honor.

The COURT. Is that abandoned?

Mr. MCAULIFFE. 68,801 did not appear on their list in Government Exhibit 2001, therefore it was not included.

The COURT. You are not going to discuss it?

Mr. MCAULIFFE. I am not going to discuss it.

The COURT. What about Interference 74,559, International Paper Company versus Du Pont?

Mr. MCAULIFFE. We are not going to discuss that because we don't think it is relevant to this case.

The COURT. Very well, sir. Then you have completed that section on the defendant's practices involving patent interefernce proceeding; is that correct?

Mr. MCAULIFFE. Yes, your Honor.

Mr. GESELL. Except they are going to handle the ones with relation to caps and bands in another section.

Mr. MCAULIFFE. Caps and bands at another time.

It is the Government's position, your Honor, that the settlements of the interferences just discussed are a manifesta-
5961 tion of one method Du Pont used to prevent anyone from
getting a foothold into the technology of the cellophane industry.

That concludes my discussion, your Honor.

The COURT. Do you have any comments?

Mr. GESELL. Your Honor, I have my objections pending.

The COURT. Do you wish any further discussion on this section?

Mr. GESELL. If your Honor is going to admit the material.

The COURT. I am going to rule on it now.

Mr. GESELL. I do want to comment, but I will wait for your Honor's ruling first.

The COURT. Very well.

I have considered the objections to the documents placed in evidence late yesterday afternoon and today as they relate to defendant's practices and policies dealing with patent interference proceedings with respect to the following companies: A. C. Spaulding, Aluminum Company of America, American Can Company, Carbide & Carbon Company, Eastman Kodak Company, Monsanto Chemical Company, Goodyear Company, Marbo Patents, Inc., Hercules Powder Company, Rosenberg Brothers.

All these writings, with the exception of those whose lack of
authenticity has been noted and challenged, are admitted
5962 in evidence. I am not required, at this time, to comment
on what weight or credibility I shall give such writings.

I have in mind Mr. Gesell's objections going to incompleteness of proof; lack of evidence of the fundamental basic facts upon which the admitted writing rests; the impossibility of understanding the writings without some evidence of the subject matter discussed in the admitted documents; and the objections of lack of relevancy and materiality.

I realize the evidence contained in the writings goes to the question of defendant's intent, and the force of the objection that the proffer lacks probative value as showing intent.

In addition, I have concluded, however, the proffered documents will not be excluded because the complete records involving the various interference proceedings are not offered by the Government.

I prefer to make my ruling on this phase of the Government's case promptly and without further dealy. Whatever this particular phase of the Government's evidence shows, I leave to the parties to argue when we approach a decision on the merits of the case.

5963 Mr. Gesell. So that we may have a statement, your Honor, of our position as to what it shows, I would like briefly to comment, your Honor recognizing that there are some disabilities under which I proceed because of the nature of the material offered from the point of view of completeness.

We say, first of all, that each of these interferences was settled by counsel at arm's length in accordance with customary Patent Office procedure, not only as between counsel representing these companies but the procedure as followed generally in the Patent Office under its rules and regulations in all phases of patenting practice.

Second, we say that the inventions involved were all of minor consequence. None of them in any way was basic to moistureproof cellophane or processes for manufacturing moistureproof cellophane.

Third, that the parties involved in these interferences were large concerns engaged in other lines of business, Eastman, Carbide, American Can, Monsanto, and so forth. None of the documents presented indicate in the slightest way that any of these companies wanted to make moistureproof cellophane. They were concerned with their own activities, their own lines of research. None of them stated to duPont or indicated in their own writings that they had the slightest interest in making cellophane. Moreover, almost without exception none of the inventions could
5964 have been practiced by these other parties to the interference without a license from Du Pont under the dominating basic moistureproof patent. That is true as to Interference 68,197, 68,651, 69,624, 73,959, 70,341; 71,448, 71,449, 74,566, 72,191,

73,672 and 71857. The two remaining are, one, the golf club grip covers, and the other is the patent of Alcoa on aluminum drier rolls.

Next we say that the settlements were fair, each of them somewhat different in detail. In a large number of the cases Du Pont proved to be prior and according to these records would have won the invention anyway. So that the agreements certainly as to those had a liberalizing effect in granting the other party any rights which they would not have had had the matter gone through interference. In the others had the other parties won, they could not have practiced the inventions because of the domination of the basic moistureproof patent.

The Court. What were they, simply adaptations to new uses?

Mr. Gesell. Your Honor, in most cases they were various alternative kinds of what are called moistureproofing compositions, which were developed by these other people in connection with coatings and compositions that they were preparing for use on plastic, on rubber film and other things of that kind which might have some application in cellophane manufacture. A couple of them are plasticizers, one of them relate to these aluminum
5965 drier rolls, but in most cases they are moistureproofing compositions or plasticizers of various kinds.

Now, Du Pont's policy, as these documents reveal, was, in our view, realistic and quite hard-headed. When these interferences were declared, Du Pont said, "We are always prepared to settle to save the time and the expense and the trouble of protracted proceedings, but we have one cardinal principle, that we are going to litigate these matters through the Patent Office unless you are prepared to concede to us the claims that read on our moistureproof cellophane.

That was a perfectly realistic position. In some cases, the ones that are not presented here, matters were litigated through the Patent Office. In many cases these were litigated through a substantial number of proceedings.

Du Pont was not required to settle on any different terms, and since in most cases it probably would have won anyway according to the priority findings, I cannot see the consequence of it. These parties were brought together not by Du Pont but through the declaration of the interference, and your Honor will have noted that in many cases the other party sought out Du Pont to initiate the settlement.

The main purpose that I understand apart from the question of intent that underlies the introduction of this material is to support the Government's claim that all of these people were
5966 excluded by Du Pont from the manufacture of cellophane.

I say if that is the case, Aluminum Company and Eastman and Union Carbide and other concerns of that magnitude and experience certainly showed an unusual weakness that they would offer the minute the interference was declared not to press any claims as to cellophane, and never once suggest to Du Pont that they wanted to make cellophane, and that the Government is unable to produce a single witness from these people, though it has been around to all of them, who says, "We wanted to go into the business and Du Pont kept us out."

Mr. McAuliffe. I would like to answer Mr. Gesell by recalling to your Honor what the setting was at the time of the settlements.

First, because of the Du Pont-Sylvania agreement, none of these parties could have been licensed by Du Pont without Sylvania's approval.

Secondly, let us recall that the basic moistureproof patent was not adjudicated at this time. Admittedly by issuing from the Patent Office it was of prima facie validity. However, the possibility of the basic patent being challenged and declared invalid still existed at the time of these interference settlements involving the coating of cellophane—the years 1936 through 1939.

Now, let us assume that the patent was declared invalid—by these agreements these potential competitors were excluded
5967 from the use of their coating composition on cellophone.

Thus, by these agreements Du Pont was making its control of the moistureproofing of cellophane airtight.

Third, another effect these agreements had was to extend Du Pont's monopoly or patent control over the moistureproofing of cellophane beyond the expiration of the basic patent.

Thus, it is the Government's contention that the holding of the moistureproof basic patent is no defense to the making of these agreements.

Mr. Minicus. Some of the evidence that has gone in heretofore, we believe, has established that there was the existence of certain business organizations in this industry desirous of obtaining plain cellophane from the defendant so that they could coat it with their own moistureproofing compositions.

Mr. Gesell has said repeatedly that nobody wanted to manufacture moistureproof cellophane. I don't know what his definition of manufacturing moistureproof cellophane is, but I guess if you buy a sheet of plain cellophane and you smear this wax on it in solution and moistureproof it, why, you have made moistureproof cellophane where it wasn't before anyway.

We think it has further been shown that in the event such coating endowed the film with moistureproof qualities, the operation was measured by the scope of the Du Pont-Sylvania agreement, and if found to be covered thereby was to be discouraged and stopped.

5968 We have seen that among others the activities of the Dearborn Company, the Dobeckmun Company, the Shellmar Company and various laminators were judged in this manner. Despite the fact that these concerns were all purchasers of cellophane from Du Pont, they were not tolerated to moistureproof cellophane and the reason for this was stated to lie in the agreement, never in the patents.

We have also seen how various large and very able corporations were excluded through these agreements of certain rights pertaining to moistureproof cellophane. There are about to be introduced into evidence further documents designed to establish, first, that in a few instances in which others were licensed under certain of the basic moistureproof patents they were expressly excluded from operations within the field of moistureproof viscose regenerated cellulose.

In other words, Mr. Gesell just mentioned a few moments ago that these patents that were involved in interference were all of a very minor nature. Well, we don't accept that statement, to begin with. Some of those coatings had real value. But even the people who were licensed under the so-called five basic patents we shall see in their license agreement were very definitely and very expressly excluded from the field of moistureproof regenerated cellulose.

Secondly, the documents about to be introduced are designed to show that on several occasions customers of Du Pont 5969 and others desired to moistureproof plain cellophane either by their own compositions or in the course of laminating processes developed by themselves. Not in a single instance did these applicants acquire a license under those patents. Indeed, Du Pont announced its policy repeatedly that it could not and would not license others to operate under these patents.

Now, I would like to make reference to Government Exhibit No. 403, which is the large bound volume containing abstracts of all of the Du Pont licenses that have been granted in the period covered by the complaint, and that indicates that seven companies have been licensed under the so-called five basic patents. These companies are: the Sylvania Corporation, about which we have heard a great deal, and likewise the Marathon Corporation. That is two of the seven that have been so licensed. In addition, the Riegel Company, Rhinelander Paper Company, Peroxyln Paper Company, Eastman Kodak and Hercules have received licenses under these five basic patents. Government Exhibit 403 shows that.

Government Exhibit 403 also establishes that on the article of manufacture patent, that is, 1,737,187 only Sylvania and Marathon were licensed. No one else ever got a license under that but Sylvania and Marathon, and we have seen the circumstances of those licenses in great detail.

We notice that the Riegel Paper Company was licensed under four of the five—in other words, they were licensed
5970 under every one but the article of manufacture patent.
They had the composition and the two process patents and the apparatus patent.

The Rhinelander Paper Company had a similar license under all four, as did the Peroxyln Company.

Eastman Kodak in 1912 received a license under the composition patent and under the second process patent.

As we have seen in the interference procedures, as a result of those procedures Hercules did get a license under the last three, the two process patents and the apparatus patent.

Now, the Government offers in evidence Government Exhibit 2498.

(Letter from Mr. Prall to Mr. Hatt dated February 6, 1912, was received in evidence and marked "Government's Exhibit No. 2498.")

Mr. MINICUS: Beginning on page 2 of this exhibit we find an explanation of the licenses to the Rhinelander Paper Company and the Riegel Paper Company within the scope of these five patents.

The COURT. Where are you in your case now, Mr. Minicus?

Mr. MINICUS. We are still under the operation of the moistureproof patent pool in the index. We have not moved on from there. That is the second sub-heading in the index under Moistureproof Patent Pool.

The COURT. 5 b?

5971 Mr. MINICUS. That is correct, sir.

On page 2, of Government Exhibit 2498, the first full paragraph reads:

"Mr. Yerkes asked a question which led to a review of whatever positions we may have taken of an allied nature in the past and the following were mentioned:

"1. It became expedient some years ago to turn over to Dobeckmun the business of laminating two thin viscose films together to make a thick film. In no case, however, was a moistureproofing adhesive employed and in no case was the resulting laminated product more moistureproof than the original films."

In other words, in that case Dobeckmun was simply using two sheets of plain film, laminating them together with an adhesive that gave no added moistureproof quality to the film. Therefore that was not within the scope of the agreement.

Continue reading:

"2. Some years ago, we granted a license to the Rhinelander Paper Company to laminate two sheets of paper together with a moistureproofing adhesive composition and we permitted the F. & F. Department to supply gallons of moistureproof compositions. Actually, this venture did not develop and the agreement was subsequently terminated."

You will note there, your Honor, in the second line
5972 it is two sheets of paper, of fibrous material.

"3. At about the same time, we licensed the Riegel Paper Company to coat glassine paper with a moistureproofing composition and this business continues and we derive a certain royalty therefrom."

Mr. Gesell. I don't know where this kind of thing stands under your Honor's ruling about substitute materials and competitive situation. Is that kind of a situation within the scope of your Honor's ruling or without, the licensing of competitive manufacturers making materials that competed with cellophane?

The Court. You see I have not had the purpose stated to me——

Mr. Gesell. I have neither, and I am asking the question to try to focus——

Mr. Minicus. If Mr. Gesell will permit me to explain the purpose, I will do my best.

The Court. What is the purpose?

Mr. Minicus. As Mr. Gesell has often had occasion to resort to these products in another context than that of the competitive market, I am referring to them here to show only that there were other products which were licensed under these agreements but never cellophane. In other words, this has nothing to do with the competitive market at all. It might as well be bricks or
5973 glass or anything else they are coating with this. It happens to be glassine that they are coating with this composition. I am simply using that to point out that whoever did get licenses under these patents never got them for cellophane.

Mr. Gesell. What difference does it make on his case?

The Court. That is what I don't understand. I don't understand the purpose as stated. Would you go over that ground again?

Mr. Minicus. The purpose of showing all of this?

The Court. Yes.

Mr. Minicus. Yes, your Honor. I simply want to clear up the fact that there never was anyone who had ever been licensed under the five basic patents to coat regenerated viscose cellulose other than Sylvania and Marathon. I just want to establish that as a basic fact in the case, that nobody got licenses under these patents. We are claiming that the purpose of the moistureproof patent pool was to exclude everybody else, and at this point I am showing that nobody ever got a license under any of those patents.

The COURT. But you are going into the field to show in fact what kind of a license they did get, and that impinges upon the matters which fall into the category of substitute materials.

Mr. MINICUS. Mr. Gesell has had reference to glassine and
other things completely. It is not in the competitive
5974 market, your Honor. It is simply being used to show that
where they did get licenses under these patents they didn't
get them for cellophane, they got them for something else—in this case it happens to be glassine, in another case it happens to be paper.

Mr. GESELL. But your Honor will notice that if the contention is that these patents were not licensed to competitors—which is the basic contention that is made—by excluding the licenses on these competing materials, he is both trying to have his cake and eat it. If these are licenses to competing materials, then they go to the question of how this patent arrangement worked, and if they are not licenses on competing materials they have no relevance in this case on his theory of it.

5975 Mr. MINICUS. Your Honor, I have to read the document
to show where the license went. I can't edit the document
as I am reading it and say in this case that the Riegel Paper Company—at the same time we licensed the Riegel Paper Company, too, and then change the wording of the document to some other material than cellophane.

The COURT. Why do you have to make reference to the document at all under your theory of the case? You will prove affirmatively that Sylvania and Marathon got licenses, then you stop. That is your proof.

Mr. MINICUS. Yes, your Honor.

The COURT. There is nothing before me in that event that anybody else got them.

Mr. MINICUS. But I want to show, your Honor, that nobody else got them. That nobody else got the licenses to operate within the field of viscose regenerated cellulose. I want to show that only Sylvania and Marathon got them.

The COURT. How far are you going to go to prove your negative?

Mr. MINICUS. About three or four documents, your Honor. This document and one more.

The COURT. The proffer being for the limited purpose stated, I shall as a matter of trial court discretion allow you to take up the documents for discussion.

Mr. MINICUS. Thank you.

5976 (Reading.) "At about the same time, we licensed the
Riegel Paper Company to coat glassine paper with a mois-

tureproofing composition and this business continues and we derive a certain royalty therefrom.

"4. At a later time, it became expedient to license the Marathon Paper Company to coat P. T. viscose film with a rubber-wax moistureproofing composition as a cheese wrap. This was done with Sylvania's consent and one of the considerations in our minds was that the film they were making was not transparent. This business continues.

"5. The Minnesota Mining & Manufacturing Company have for some years been applying their pressure-sensitive gumming to the viscose film and they have made allegations that the film was made moistureproof thereby. We have always felt that it was a different product from our product because it is one-sided coating, because it is definitely sticky, because it is not transparent, because it is not moistureproof according to the standards of the industry and because it is a narrow tape as distinguished from our wide film. Another point which I think has always affected our thinking is that the Minnesota Mining & Manufacturing Company was making their gummed tape with paper long before we went into the cellophane business and it might easily be said that all they did was to substitute viscose film for the paper."

5977 That document then, your Honor, takes care of two more of the licenses. The Riegel license, we have seen, was limited to glassine, and the Rhinelander license was limited to paper.

The Government offers in evidence Government Exhibit 2728 at page 3583. This is a report from the Committee on Patents to the Executive Committee dated October 19, 1942.

(The report from the Committee on Patents to the Executive Committee dated October 19, 1942, was received in evidence and marked, "Government Exhibit No. 2728.")

Mr. Minicus. The heading is "License to Eastman Kodak Company under U. S. Patents Nos. 1,826,969–1,826,699–2,147,628–2,147,629 RE Moistureproofing of Fibrous Wrapping Materials."

Reading the second paragraph under the heading:

"(1) Because of the shortage of wrapping materials such as metallic foils, Eastman desires to moistureproof paper for use in wrapping their photographic products. The coating lacquers they wish to use are covered by our cellophane moistureproofing patents which also apply to fibrous (paper) bases."

The fourth paragraph beginning (3):

"Also, on recommendation of F. & F., a license was granted to Pyroxylin Products, Inc., in 1939 to make, use and sell moistureproofing lacquers covered by 2 of these patents and 3 others, limited to coating of fibrous materials."

5978 Now, reading the next to the last paragraph on the page beginning with (4):

"In all of these cases, the licenses are limited to use on fibrous bases. The use on non-fibrous bases such as cellophane film remains exclusive to du Pont except for the rights to Sylvania Industrial Corporation under our broad moistureproofing license agreement with them."

If we consider, then, your Honor, the seven companies that were licensed under these patents according to Government Exhibit 403 we find Sylvania and Marathon were licensed under regenerated cellulose. Riegel was not, Rhinelander was not, Pyroxylin was not, and Eastman was not according to the documents just read, and we have seen in the agreement introduced by Mr McAuliffe between Du Pont and Hercules Powder Company that Hercules Powder was also restricted to fibrous bases.

Now, a statement was earlier made in this trial in response to an inquiry by your Honor. Mr. Gesell then stated, "Well, who wanted to manufacture moistureproof cellophane?"

The documents about to be introduced illustrate several instances of when people were interested in coating cellophane to produce a moistureproof product, and most of the time they were interested in coating it with their own compositions of their own invention.

The Government offers in evidence a group of exhibits, Government Exhibit 2700 at page 3543.

5979 Government Exhibit 2499 has previously been admitted and attention is just requested to it now.

We offer in evidence Government Exhibit 2698 at page 3538; I offer in evidence Government Exhibit 2699 at 3541; Government Exhibit 2701 at page 3545; Government Exhibit 2702 at page 3547; Government Exhibit 2703 at page 3548; Government Exhibit 2704 at page 3549; Government Exhibit 2707 at page 3552; Government Exhibit 2705 at page 3550; and Government Exhibit 2706 at page 3551.

It is submitted that these documents will establish——

Mr. Gesell. Could I have a moment to consider them before you start?

Mr. Minicus. Certainly, sir.

We submit that these exhibits will establish that during 1941 the Interstate Folding Box Company was conducting certain experiments in film lamination. These experiments, the documents expressly show, included the lamination of plain transparent cellophane to paper by a moistureproof adhesive. Laminations were also being constructed with the use of M. S. A. T. purchased, I believe, from Du Pont, a moistureproof cellophane which proved vastly superior on Du Pont's own test in moistureproofness to Du Pont's M. S. A. T. film alone.

Du Pont learned of this situation according the documents and considered what its position should be as a supplier of cello-
5980 phane to the Interstate Folding Box Company in light of its knowledge of these experiments and determined, one, that if it sold plain transparent cellophane to Interstate for the purpose of laminating it with a moistureproof adhesive Sylvania's consent would have to be acquired; two, that it would not sell plain transparent cellophane to the Interstate Folding Box Company for the purpose of laminating it with moistureproof adhesives; and, three, that it would supply film already moistureproofed for this purpose.

Under the latter decision to supply Interstate with film already moistureproofed, Du Pont submitted a license to the Interstate Folding Box Company under its principal patent for laminations which involved M. S. A. T. film. This license or this proposed license was expressly limited to manufacture, use, and sell products comprising moistureproof regenerated cellulose film. Secondly, under this proposed license Interstate was to acknowledge the validity of United States letters patent No. 1,983,875, which was the particular lamination patent involved. Thirdly, there was a provision whereby Du Pont could cancel the proposed license at will.

Because of the restrictive nature of the proffered license Interstate Folding Box Company refused to accept it, and Government Exhibit 403 again will show that no license under any Du Pont patent has ever issued to the Interstate Folding Box Company.

Mr. Gesell. On that proffer I don't see what the rele-
5981 vancy of it is, your Honor. What is the issue that this is tendered to meet, if I may inquire? They went ahead, apparently, and made the product.

Mr. Minicus. We submit, your Honor, that there are three declarations or two declarations at least of Du Pont policy in these documents that are very relevant to all the points we have been stressing under the moistureproof relationship as it existed between Du Pont and Sylvania: one, that if it sold plain transparent cellophane to the Interstate Folding Box Company for the purpose of laminating it with moistureproof adhesives, Sylvania's consent would have to be acquired. Now, what is the basis there? Interstate was a customer of Du Pont for cellophane, had bought plain cellophane from Du Pont in the past. Interstate through its own research had developed an adhesive that was very good in laminating in this case plain transparent cellophane to paper. Interstate was carrying on experiments in this regard. Du Pont determined that if Interstate wanted to go through with this they could not sell plain transparent cellophane to Interstate for that purpose. Now, there was no place else where Interstate could have gotten it, I suppose.

Mr. Gesell. The patent ran out on that.

Mr. Minicus. But the decision was not made on the fact of the patent, your Honor. The document is very specific that if—

5982 Mr. Gesell. Could I have an answer to my question, your Honor, as to what the relevance of this is?

Mr. Minicus. I can't while you are talking, Mr. Gesell. If you stop I will try to continue answering it.

The Court. Let us start afresh. With reference to this group of exhibits commencing with GX 2700 state your purpose in relation to the Interstate Folding Box Company vis-a-vis Du Pont. First you say this shows Sylvania's consent had to be given before they could enter into any agreement with the Box Company. What is your second point?

Mr. Minicus. That under those circumstances Du Pont would not sell plain transparent cellophane, an unpatented product, to the Interstate Company for those purposes.

The Court. Well, did Sylvania give its consent or not?

Mr. Minicus. It was not even sought, your Honor. Du Pont recognized the fact that they would have to get its consent before they did. My main point is this: That instead of Interstate's opportunity of acquiring the right to make this lamination under its own patent being measured by Du Pont's willingness to grant a license under its own patents, the measure was the Du Pont-Sylvania agreement. In other words, as has happened all the time in this case, the agreement has replaced the patent.

The Court. This was as of what time?

5983 Mr. Minicus. The date of this was 1941, your Honor.

The Court. That was after the agreement had been amended?

Mr. Minicus. Yes.

Mr. Gesell. It was still exclusive.

The Court. But there was still a specific provision as to consent?

Mr. Gesell. It was still exclusive.

The Court. It was still exclusive?

Mr. Gesell. And we say under the documents that we could not license them without their consent, because we would be selling the plain and we would be giving an implied license to this customer which was making it moistureproof. But I can't see what the relevance is. How is it putting us for [illegible] on this charge?

Mr. Minicus. I think this document is probative of the fact that as long as we had this tie-up between Du Pont and Sylvania where it was understood between the two people in the industry owing these patents that nobody else was going to be licensed, nobody else was going to be licensed; and the proof of that is that Mr. Gesell asked the question the other day Who wanted a license? Here is a fellow right here who would have liked to have had it, the Interstate Box Company.

Mr. Gesell. Not at all. He turned down the license and he went right on making his product.

5984 **Mr. Minicus.** Oh, he never wanted to manufacture moistureproof cellophane.

Mr. Gesell. I think we ought to shorten this. Here is a whole bundle of documents. What is the issue we are meeting?

Mr. Minicus. The license that he turned down, your Honor, was not a license to moistureproof cellophane; the license he turned down was a license to buy cellophane already moistureproof so he could laminate then with his moistureproof adhesive to paper, and that that license would be cancellable at will, and he would have to acknowledge the validity of the patent in this case. That is the license he turned down.

Mr. Gesell. He continued to buy moistureproof from us, your Honor, as the exhibit shows, and made his product. He bought M. S. A. T. and laminated it and went ahead.

Mr. Minicus. He was never able to buy plain transparent cellophane.

Mr. Gesell. That is right.

Mr. Minicus. To use in conjunction with his own invention. We have an unpatented article, an adhesive that was the invention of the customer, and the inability of the customer to buy plain transparent cellophane. Why? Not because of Du Pont's patents. They say so right here. But because of that Du Pont-Sylvania agreement which comprised all of the patent owners in
the business. It wasn't just as if he could go around
5985 the corner to somebody else and get it. He couldn't do it.
Everybody that could possibly help him out was tied up by this agreement. That is what we have been proving all the way through this moistureproof patent pool.

Mr. Gesell. I keep wanting some statement of an issue, your Honor, and not an argument. What is the issue?

Mr. Minicus. The issue is simply this: That all of the manufacturers of cellophane, all of the patent owners of that product, had gotten together and said they were not ever going to license anybody else to manufacture under it, and nobody ever did get a license; and when the dominant units in any industry get together to exclude anybody else from ever coming into it, that patent pool under every case that has ever held on a patent pool, that patent pool has been illegal.

5986 The Court. Well now, I have got to make a specific ruling. What exhibit is under attack?

Mr. Gesell. The group he just offered, your Honor.

Mr. Minicus. One of those has already been admitted.

The Court. 2499 has been offered and admitted.

Mr. Minicus. That is correct, your Honor.

The Court. Well, have we gotten past Exhibit No. 2700?

Mr. Gesell. No. That is in this group.

Mr. Minicus. 2700 is the first in this group.

Mr. Gesell. Well, your Honor, I will desist in my effort then to sharpen the issues because I don't know how else to do it than to rise this way.

The Court. My difficulty is in deciding on the admissibility of a writing which I have not even heard, have never even seen. So I am going to follow this course. You go ahead and make reference to your documents, and if they are improper, and in the event you do not arise, I will do it sui sponte, but I do not think I will need to do it.

Mr. Gesell. I will arise if your Honor doesn't mind my arising.

Mr. Minicus. Is your ruling that you would like to have me make direct reference to each one of these documents, your Honor? I have tried to summarize them to get this thing expedited as quickly as possible.

The Court. I will make my ruling. Let them be 5987 admitted.

(Document entitled "Interstate Folding Box Company—Notes from Letters in Lake's File," dated February 27, 1942, was received in evidence and marked "Government's Exhibit No. 2700.")

(Letter from Mr. Prall to Mr. Lake dated February 24, 1942, was received in evidence and marked "Government's Exhibit No. 2698.")

(Memorandum from Mr. Hines to Dr. Karns dated February 26, 1942, was received in evidence and marked "Government's Exhibit No. 2699.")

(Letter from Mr. Stout to Dr. Mitchell, dated March 4, 1942, was received in evidence and marked "Government's Exhibit No. 2701.")

(Letter from Mr. Stout to Mr. Daley dated March 12, 1942, was received in evidence and marked "Government's Exhibit No. 2702.")

(Letter from Dr. Mitchell to Dr. Karns dated March 16, 1942, was received in evidence and marked "Government's Exhibit No. 2703.")

(Letter from Mr. Ichla to Mr. Bergstein dated April 30, 1942, was received in evidence and marked "Government's Exhibit No. 2704.")

(Agreement between E. I. duPont de Nemours & Company and Interstate Folding Box Company was received in evidence
5988 and marked "Government's Exhibit No. 2707.")

(Letter from Mr. Ichla to Mr. Bergstein dated May 21, 1942, was received in evidence and marked "Government's Exhibit No. 2705.")

(Letter from Mr. Bergstein to Mr. Ichla dated May 23, 1942, was received in evidence and marked "Government's Exhibit No. 2706.")

Mr. MINICUS. The Government offers in evidence Government Exhibit 2708 at page 3555 and Government Exhibit 2709 at page 3556.

(Letter from Dr. Karns to Dr. Hyden dated June 5, 1942, was received in evidence and marked "Government's Exhibit No. 2708.")

(Memorandum from Mr. Smith for file entitled "Moistureproofing Lacquers for Picatinny Arsensal," dated June 12, 1942, was received in evidence and marked "Government's Exhibit No. 2709.")

Mr. MINICUS. These two exhibits disclose that during June of 1942 duPont was conducting tests for the Picatinny Arsensal, and these tests were leading to the coating of dried cellulose tubes with some type of a moistureproof composition.

In considering what the policy of the duPont Company should be, it was determined that if Picatinny Arsensal was to work this process itself which involved the coating of a dried cellulose
5989 tube, it would be necessary for special arrangements to be made with the Sylvania Corporation. Here again we have a need for this product by somebody. duPont is working on the test hand in hand with them. They have helped them develop this stuff. But if Picatinny Arsensal, after it is all developed, wants to go ahead with it and coat this tubing with a moistureproof composition, duPont, who has done the preliminary work with them, can't license them under their own patents. They have to make some sort of a special arrangement with Sylvania.

I submit to your Honor that there was never a patent pool that was held to be illegal that wasn't based on exclusive cross licenses. You can't have a patent pool unless you have exclusive cross licenses to begin with, and to try to attempt to justify this issue here or say there is no issue because this is an exclusive cross license is begging the point. How in the world could you have an exclusive patent pool designed to exclude others without exclusive licenses? That is the point exactly.

The Government offers in evidence Government Exhibit 2710 at page 3557, Government Exhibit 2711 at page 3558, Government Exhibit 2712 at page 3559, Government Exhibit 2713 at page 3560, Government Exhibit 2715 at page 3562, Government Exhibit 2716 at page 3563, Government Exhibit 2717 at page 3564.

(Letter from Mr. Wylde to E. I. duPont de Nemours & Company, attention: Mr. Ichla, dated May 25, 1942, was received in evidence and marked "Government's Exhibit No. 2710.")

5990 (Letter from Mr. Ichla to Deerfield Glassine Company, attention: Mr. Wylde, dated May 27, 1942, was received in evidence and marked "Government's Exhibit No. 2711.")

(Letter from Mr. Wylde to E. I. duPont de Nemours & Company, attention: Mr. Ichla, dated May 29, 1942, was received in evidence and marked "Government's Exhibit No. 2712.")

(Letter from Mr. Brown to Deerfield Glassine Company, attention: Mr. Wylde, dated June 17, 1942, was received in evidence and marked "Government's Exhibit No. 2713.")

(Letter from Mr. Wylde to E. I. duPont de Nemours & Company, attention: Mr. Brown, dated June 20, 1942, was received in evidence ad marked "Government's Exhibit No. 2715.")

(Letter from Mr. Lake to Mr. Wylde dated June 23, 1942, was received in evidence and marked "Government's Exhibit No. 2716.")

(Letter from Mr. Wylde to E. I. duPont de Nemours & Company, attention: Mr. Brown, dated August 4, 1942, was received in evidence and marked "Government's Exhibit No. 2717.")

(Mr. Minicus. In these exhibits, we find a similar instance. During May of 1942 the Deerfield Company had a contract with a customer for whom Deerfield was engaged in laminating plain cellophane to another product.

Mr. Gesell. Why don't you mention it?

Mr. Minicus. Because if I mention it I am going to have
5991 you up addressing the Court saying I am talking about secondary substitutional material. So I have tried to avoid it if I possibly can.

Now, inquiry by Deerfield to duPont caused some concern in the latter organization, duPont, over whether these operations would result in a moistureproof lamination. Further inquiry was made and an investigation started by the duPont Company. duPont then notified Deerfield that patents have been issued to them covering moistureproof laminations. When Deerfield inquired as to the nature and identity of the patents, an evasive answer was sent and Deerfield was instructed to send its samples to duPont.

Deerfield then directly asked duPont whether or not it intended to press its patents and complained that it had not received a more definite answer concerning the identity of the patents.

The executives of the Deerfield Company were quite upset about this fact. They had been notified that they were infringing patents and they asked and they couldn't even find out what patents they were infringing.

No further correspondence exists in the Government files on this matter, except for Government Exhibit 403 again, which shows that Deerfield was never licensed under any of duPont's moistureproofing patents.

The Government offers in evidence Government Exhibit 2718 at page 3565. This is a letter from G. M. Karns to Mr. F. M. 5992 Prall, "Subject: Supplying of Lacquers to Outside Companies." It is dated June 29, 1943.

Government's Exhibit 2718

(Letter from Mr. Karns to Mr. Prall dated June 29, 1943, was received in evidence and marked "Government's Exhibit No. 2718.")

Mr. Minicus. It reads:

"I discussed with you the fact that we had furnished the Eppley Laboratories, Inc. of Newport, Rhode Island, with a moistureproofing lacquer for special war work. This lacquer was designated as Moistureproofing Compound, Sample No. 2328. I also stated that as a result of a further request for large amounts of material we were turning the matter over to the F. & F. Department, who would supply the lacquer either as first sent to these people, or in a similar composition from their own line.

"In discussing this with Mr. Hines he suggested that we take precautions lest we give an implied license under our patent for moistureproof film, and also that we might contribute to a violation of the Sylvania agreement.

"You pointed out that the F. & F. Department sold lacquers to many outside firms; that they were fully cognizant of the obligations of the Company in so doing; and, that no special precautions need be taken in this case if they handled it in their usual manner."

The Government offers in evidence Government Exhibit 5993 2720 at page 3567. This is a letter from W. W. Smith to L. A. Yerkes dated April 7, 1944. The subject matter is "Agreement Between American Viscose Corporation And Sylvania Industrial Corporation."

(Letter from Mr. Smith to Mr. Yerkes dated April 7, 1944, was received in evidence and marked "Government's Exhibit No. 2720.")

Mr. MINICUS. I will read only the first two paragraphs:

"I have your note of April 5, 1944, inquiring as to the possible meaning of the agreement between the above-identified companies, by which American Viscose has acquired, or expects to acquire, certain patents, patent rights and licenses from Sylvania."

This is a negotiation, your Honor, that preceded by more than two years the merger of American Viscose and the Sylvania Industrial Corporations. I wouldn't want there to be any confusion about that. More than two years before that merger Sylvania, still a very independent company, licensed certain patents, quite a block of them, to the American Viscose Corporation, and duPont is inquiring into the possible meaning of that according to the first paragraph of this letter.

Continue reading from the second paragraph:

"I think we may accept as a certainty that none of the rights acquired by American Viscose can be within the field
5994 of moistureproof regenerated cellulose film. Our agreement with Sylvania provides for the reciprocal granting of exclusive licenses which are neither assignable nor licensable to anyone save the successor, or assignee of the entire business of either party. At the moment then none of our patents in the moistureproofing field licensed to Sylvania, and none of the Sylvania patents in the same field exclusively licensed to us can be licensed to American Viscose."

That concludes my discussion of that section, your Honor. The entire section, beginning with the interferences, has been a development of the exclusionary effect of the moistureproof Sylvania relationship upon others. The first section, of course, was devoted to the restraints upon Sylvania. The second section is the more important. We think it is quite clear, from the terms of the agreements themselves and from these documents that have been read, that the purpose here was to exclusively cross license these patents in such manner that no one else could possibly get a license under them, and with the single exception of the very restrictive license to Marathon, no one else ever did get it, and it all goes back to the letter of Mr. Yerkes when the agreements were being executed, that "We will form a united front, throw all of the patents into one pot and stand unitedly against the assaults from anyone else from without the industry."

Mr. GESELL. These statements that Mr. Minicus has
5995 made bear no relation to the evidence he has offered. He has proven, in my view of the evidence, your Honor, only two

simple facts. One is that when you have licensed a man exclusively, you must obtain his consent before you can violate that license and license someone else. That I wouldn't have thought would have taken 50 exhibits.

The second point I think he has proven is that we would not sell plain cellophane to someone who wished to make it moistureproof by applying a coating, whether it was his coating or a coating he bought from us, thereby giving him an implied license under our basic moistureproof patent, a thing we could not do because that patent was licensed exclusively to Sylvania.

And as a purely business matter, what obligation is there under the anti-trust laws or any other laws that we would make the plain cellophane and, though we had a patent which could prevent the coating being done by someone else, sell it to him so that he could violate our patent?

Mr. Minicus. I just have one more section, your Honor, under the Moistureproof Patent Pool section, and I will try to finish that up this afternoon.

On January 1, 1945, at a time when both parties to the Du Pont-Sylvania moistureproof patent cross-licensing arrangement were aware that their moistureproof agreement was under active investigation by the Department of Justice—

5996 Mr. Gesell. All right, now, your Honor, I want to have this out right now, if I may interpose——

The Court. I have not heard what the offer is, or what the discussion is going to be. What section are you on?

Mr. Minicus. The final one, the termination of the moistureproof.

The Court. Now state your purpose and then I can understand your objection in better fashion.

Mr. Minicus. I said that at a time when both parties were aware that this relationship in moistureproof cellophane was under active investigation by the Department of Justice——

The Court. Give me the year.

Mr. Minicus. January 1, 1945, was the date of the agreement, although it was transacted a little later than that and moved back. Du Pont executed a new agreement with Sylvania which supplanted the cross-licensing agreement of April 26, 1933 and its amendments. And if Mr. Gesell is going to think I am going to say it was because of that investigation that they reformed and cut out all this stuff, I am not going to say it at all. I am going to try to prove here it continued right along even after the reformation of that agreement.

Mr. Gesell. But your Honor notices the snide way in which he approaches that. There was no knowledge on the part of Du Pont at the time this change was made of any possibility of any action being brought by the Anti-Trust Division against 5997 duPont with respect to cellophane. That matter had been investigated many years previously. No action had been brought of any kind, and the only reason I rose to my feet was to strike down that implication in this case——

The COURT. That you were running for cover?

Mr. GESELL. Yes, right away.

The COURT. Proceed. Let's see what we can accomplish in the next ten minutes.

Mr. MINICUS. The Government offers in evidence Government Exhibit 2744 at page 3630. This is a report from the Rayon Department to the Committee on Patents. It is dated November 21, 1944.

(Report from Rayon Department to Committee on Patents dated November 21, 1944, was received in evidence and marked "Government's Exhibit No. 2744.")

Mr. MINICUS. I might say that in 1933, your Honor, I personally was in there investigating the situation. "The Legal Department has suggested elimination of the following features of the license agreement with Sylvania Industrial Corporation dated April 26, 1933, as amended."

The suggestion, we see, comes from the Legal Department.

The Government offers in evidence Government Exhibit 2748 at page 3633. This is a report from the Committee on Patents to the Executive Committee.

5998 (Report from Committee on Patents to Executive Committee dated November 27, 1944, was received in evidence and marked "Government's Exhibit No. 2748.")

Mr. MINICUS. The heading reads "Replacement Cross-License Agreement with Sylvania Industrial Corporation Re Moisture-Proof Regenerated Cellulose Film Patents Covering Change from Exclusive to Non-Exclusive Basis, and Elimination of Provisions Limiting Sales Except upon Payment of Higher Royalty."

"At meeting of the Committee on Patents, held today, letter was presented from L. A. Yerkes, General Manager, Rayon Department, dated November 21, 1944, concurring in suggestion of our Legal Department that authority be granted to open negotiations with Sylvania Industrial Corporation with a view to effecting changes referred to above.

"Of the five original basic du Pont patents, under which Sylvania has been exclusively licensed since 1933, one product patent will expire November 26, 1946, and the balance on October 6, 1948. Pursuant to original agreement, du Pont has granted Sylvania a number of supplemental exclusive licenses on later moisture-proof cellulose film patents.

"Sylvania has exclusively licensed du Pont under a number of its patents in this field, but it is understood that we have not operated under any of such patents and, consequently, have not paid any royalties to them.

5999 "Total royalty payments by Sylvania to du Pont to the end of September 1944 have aggregated $1,417,470, and for the last few years have averaged something over $200,000 a year.

"Under the original agreement, Sylvania and du Pont were permitted to sell, before payment of higher than basic royalties, 20% in the case of Sylvania, and 80% for du Pont, of combined sales of licensed film for the year 1933, this allowable maximum rising 1% for Sylvania, and declining 1% for du Pont, each year for 9 years, or until maximums of 29% for Sylvania, and 71% for du Pont, were reached in 1942, and since continuing on that basis. Sylvania never reached its 29% allowable maximum of sales, beyond which higher royalty would have been payable. This feature has not applied so far to du Pont because, as stated above, it has not operated under any patents licensed by Sylvania.

"Provision was made in original agreement for both parties to grant supplemental exclusive licenses under patents in the licensed field issuing prior to October 6, 1948. It is now proposed in replacement agreement to have each party grant non-exclusive licenses under specified existing licensed patents, leaving any future licensing to be separately negotiated.

"After discussion, it was moved and unanimously carried that the letter be ordered filed * * *" and so on.

The Government offers in evidence Government Exhibit 2758 at page 3656.

6000 (Memorandum from Mr. Hatt to Committee on Patents dated January 18, 1945, was received in evidence and marked "Government's Exhibit No. 2758.")

Mr. Minicus. I think if I read this I won't have to read the agreement, or either of the agreements—there are two of them. This is from the Rayon Department to the Committee on Patents, dated January 18, 1945. The agreement is dated January 1, 1945.

"Pursuant to the Executive Committee Action of November 30, 1944, reading in part as follows:

"Resolved, that the Rayon Department be and it hereby is authorized to open negotiations with Sylvania Industrial Corporation covering replacement of cross-license agreement, dated April 26, 1933, as amended, and the supplemental licenses exchanged pursuant thereto, re moistureproof regenerated cellulose film patents, in order mainly (a) to change from an exclusive to a non-exclusive license basis limited to specified existing cross-licensed patents, and (b) to eliminate provisions limiting sales except upon payment of higher than basic royalty rates, subject to a provision that the licensee will be given the benefit of any lower rates charged other licensees under the same patents;"

the Rayon Department opened negotiations with Sylvania and
presents herewith a proposed termination agreement and a
6001 a proposed cross-licensing agreement, in form approved by
the Legal Department, which accomplish the objects of said
Resolution.

"In view of the change of the licenses from exclusive to non-exclusive, Sylvania requested a reduction in royalty rates.

"The royalties payable by Sylvania under the proposed agreement are as follows:"

Then under (a) is the schedule of new rates.

"(b) under the patents issued after the signing of the agreement of April 26, 1935, 2% of the net selling price."

That continues on with the royalties. The discussion of the royalty rates continues over onto page 2 of the report and then the second full paragraph on the page reads:

"The royalties in the proposed agreement, as in the present agreement, are non-cumulative, but the licensed product will bear the higher royalty rate required by any patent under which the product is made or sold.

"Assuming that Sylvania's production for the period of January 1945 through September 1948 will be at the same rate as its 1944 production, the estimated reduction in royalty under the first five patents, for that period, is as follows:"

Then there is a table which shows for that period there will be a reduction of $228,109.

"Sylvania at present operates to a minor extent under at
6002 least one of the patents carrying 4% royalty and possibly
under other patents issued subsequent to the first five. The
reduction in the royalty rate applicable to the special categories, from 4% to 2%, will reduce royalty receipts after January 1, 1945. For 1944 (9 months actual-three months estimated) this additional royalty is $13,087, representing about 6% of Sylvania's sales.

"After October 6, 1948, it is believed that Sylvania will operate under one or more of the remaining licensed patents, but we can not reasonably estimate the royalty to be received for such operations."

6003 Now, your Honor, there is only one thing I would like
to invite your attention to here, and that is in the resolution
itself. "(b) to eliminate provisions limiting sales except upon payment of higher than basic royalty rates, subject to a provision that the licensee will be given the benefit of any lower rates charged other licensees under the same patents"—in other words, a form of favored nation clause.

The Government offers in evidence Government Exhibit 2737 at page 3606. It is not necessary to read this. This is simply the termination agreement of the original agreement of April 26, 1933.

(The termination agreement of the original agreement of April 26, 1933, between Du Pont and Sylvania was received in evidence and marked, "Government Exhibit No. 2737.")

Mr. Minicus. The Government offers in evidence Government Exhibit 2755 at page 3642.

(The agreement between E. I. du Pont de Nemours & Company and Sylvania Industrial Corporation dated January 1, 1945, was received in evidence and marked, "Government Exhibit No. 2755.")

Mr. Minicus. There are certain things that I would like to point out in connection with this agreement without reading it, your Honor. On page 7 of the agreement, Paragraph 8, we see there a continuation of the reports to be made that we discussed pre- 6004 viously under the old arrangement. They were discussed, I believe, yesterday, your Honor: the quarterly reports are to continue.

On page 8 at Paragraph 10 we have the favored nation clause, and that I would like to stop for a moment to read:

"In the event that either party hereto shall grant to another a license of the character and scope granted in this agreement, under terms more favorable than those herein provided for, the licensing party shall notify the other party to this agreement, within sixty (60) days, and said other party to this agreemnt shall have the privilege, upon written notice, given to said licensing party, of substituting the essential terms of such other license in place of the essential terms of the license herein granted."

Admittedly, your Honor, that is very close to the usual favored nation clause that we find in a great many contracts. However, I invite your attention to the period back in 1937 when Mr. Gregg notified the Rayon Department that he thought a change was necessary in the mutual consent clause of the original agreement; and if you remember, your Honor, attached to that exhibit that we put in evidence at that time Mr. Gregg proposed a favored nation clause very similar to this one to supplant the mutual consent clause. I would like to keep our eye on that for just a moment. That was in Government Exhibit 2469.

6005 Mr. Gesell. He did one other thing, too. He proposed the license be made exclusive, which you are omitting from your presentation.

Mr. Minicus. I think we will finish in time for Mr. Gesell to rebut what I am saying here, your Honor.

Clause 12 provides for termination on infringement; and I think that is as far as I need to go for the discussion of the agreement.

So then with an agreement dated January 1, 1945, we find out that the former agreement has been terminated. Note the things that have been taken out: The penalty royalty has been removed, the agreement is no longer exclusive, other facts have been removed that the Government has been attacking here; so presumably, it is all cleaned up now.

The Government offers in evidence Government Exhibit 2512 at page 3283. This is a letter from Mr. F. M. Prall to Mr. C. F. Daley dated June 11, 1945. In other words, about six months after the termination agreement and the new license agreement.

(The letter from F. M. Prall to C. F. Daley dated June 11, 1945, was received in evidence and marked, "Government Exhibit No. 2512.")

Mr. MINICUS. The heading is "Moistureproof Laminated Structures."

(Reading.) "We have before us a problem, which is not unlike those discussed in your Opinions of October 22, 1942,
6006 and November 22, 1943, relating to Dobeckum, Dearborn and Camm."

We considered Dobeckmun and Dearborn and those memoranda in relation to operations under the old agreement and here is a problem which is not unlike those.

I continue reading:

"Reynolds Metal Company is interested in purchasing PT cellophane, which they will laminate to the foil side of a foil-kraft paper combination. The composite will then be overcoated with a heat-sealing composition which will, in many cases, be moistureproof.

"Now that Sylvania has only a non-exclusive license under our several patents, we are certainly free to license Reynolds if there is a need and we wish to do so."

So far so good.

I continue reading:

"If the Reynolds operation comes within the scope of the Sylvania Agreement, we would need to charge them a royalty at least equal to that paid by Sylvania."

We aparently still have the scope of an agreement and something to do with the royalty. I am going to ask the Court to please watch the development of that.

"I judge from your earlier related Opinions that we can say the Reynolds operation does not come within the scope of the Slyvania Agreement, because it does not come within the

6007 enforceable scope of the Church & Prindle product patent. Therefore, we can license Reynolds at any royalty we choose, and we can let the license run by implication if we choose."

We see in that paragraph the same kind of reasoning that existed in those memoranda in 1942 and 1943.

"Depending on what moistureproofing composition Reynolds uses, they might come within the enforceable scope of some other patents, such as the Resin Wax patent. We would then need to decide if the operation comes within the scope of the Sylvania Agreement for purpose of fixing royalty. I judge that you will feel that the scope of the Sylvania Agreement is the same as the enforceable scope of the Church & Prindle product patent, and as a result, we could conclude that the Sylvania Agreement is not involved.

"It seems to me then that we can tell the Cellophane Division that they are not hindered by contractual obligations already incurred, and they need only consider desirable business practices. With the change in the Cellophane Division Management, with the change in the character of the Sylvania Agreement, and with the approach of postwar conditions, I think it might be well to use this specific situation to plot a sound policy for the future."

Fine.

"We would be glad to have your views. I favor the wide sale of our materials with a royalty-free, non-exclusive 6008 license running by implication. The alternative to this, which I do not favor, is a specific license at a substantial royalty separately shown on each invoice."

Your Honor, I submit that here the question is posited: Can Du Pont license others to moistureproof P. T. after termination of the agreement of April 26, 1933 without considering the effect upon Sylvania?

It appears that if the operations of the third party come within the scope of the new Sylvania agreement there still exists certain entanglements.

The Government offers in evidence Government Exhibit 2513. This exhibit is a letter from Mr. Charles F. Daley to Mr. F. M. Prall dated July 3, 1945.

(The letter from Charles F. Daley to F. M. Prall dated July 3, 1945 was received in evidence and marked, "Government Exhibit No. 2513.")

Mr. Minicus. (Reading.) "Re: Reynolds Metal Company—Laminated Structures.

"This is in answer to your letter of June 11, 1945 in which you asked, in view of our patents relating to moistureproofing, what our policy should be with respect to the proposed manufacture by

the Reynolds Metal Company of a laminated structure in which plain transparent cellophane is laminated to the foil side of a metal foil kraft paper combination, the whole being over-
6009 coated with a heat-sealing composition which may be moistureproof.

"Until we learn that Reynolds is using a moistureproofing composition, our sales of plain transparent film to Reynolds carry no implied license under our moistureproofing patents.

"Even if Reynolds uses a moistureproof coating in manufacturing the said product, I doubt that the product is covered by Charch and Prindle Patent No. 1,737,187 since the cellophane is only one element in a three ply, opaqued product and the moistureproofing effect, if any, of the coating is minor in view of the uses of metal foil.

"If we sell plain transparent cellophane to a customer with the knowledge that the customer is using it under one of our patents, the customer gets an implied license under the patent for the material purchased. We lose our right to enforce the patent as to the customer's product and possibly for the full scope of the patent, so long as we continue selling the unpatented film to the customer using it for that purpose.

"As to Sylvania, we should not expect Sylvania to pay royalty to us for a product like that made by our customer under an implied license. Sylvania might, in such a situation, surrender its license under the patent and the patent could not be enforced against Sylvania or anyone else, so long as we continue selling with an implied license. Furthermore, under its license agreement, Sylvania would probably be entitled to a free license
6010 as to such product.

"Incidentally, if we do not enforce against infringers the patents under which Sylvania has a license, Sylvania has the right to surrender its license if its licensed business is substantially and adversely affected."

I will not read the rest of this letter, but I think the answer to the problem raised in the previous one is quite apparent. It still appears that if operations by a third party come within the scope of the Sylvania agreement, then Du Pont is not free to deal without considering the effect upon Sylvania. In light of the former relations between these two, there must still be doubt as to the accessibility of these patents to third parties.

I have here a new document. I believe that the defendant has copies of it.

The Court. How much more have you got before you complete this section?

Mr. Minsacus. This document is the last one except for a very short one here.

Mr. Gesell. You might tell us what it is, Mr. Minicus.

Mr. Minicus. I am about to, sir, if you will be patient:

This is Government Exhibit 2916 which we now offer in evidence. There is no page number for it, being a new document.

(The letter from W. W. Smith to Mr. R. L. Richards
6011 dated July 11, 1945, was received in evidence and marked,
"Government Exhibit No. 2916.")

Mr. Minicus. This is a letter from W. W. Smith to Mr. R. L. Richards, Cellophane Division, dated July 11, 1945.

"Re: Reynolds Metal Company—Laminated Structures.

"This letter will confirm the discussion in your office Wednesday, July 11, relative to the above subject stemming from Mr. W. G. Hunter's letter to you of May 24, 1945. I am returning herewith Mr. Hunter's letter, together with a copy of Mr. Daley's letter to Mr. Prall of July 3, 1945, which you may wish to retain for convenience in your files.

"The principal question before us was whether or not there are any patent or other legal reasons affecting our sale of plain transparent cellophane to converters for lamination to metal foil with the objective of producing a moisture barrier that is heat sealable and of high durability. A typical embodiment of the question is the proposal of the Reynolds Metal Company to produce a laminated structure in which plain transparent cellophane is laminated to the foil side of a metal foil-kraft paper combination, the composite structure then being overcoated with a suitable heat sealing composition.

"It appears that we have no knowledge of the adhesive composition which Reynolds may use to laminate the cellophane to the metal foil, nor do we know the composition of the final heat sealable coating which is to be applied at least to the
6012 cellophane side of the laminated structure. Since this is
true, our sale of PT cellophane to Reynolds Metals will carry with it no implied license under any of our patents concerned with adhesive compositions or coating compositions. Under these conditions, you are free, therefore, to sell the PT film as you please.

"Assuming that the final coating applied by Reynolds Metals might be a moistureproofing composition, the relation of the composite structure with respect to our Charch & Prindle patent and the Sylvania Agreement was considered. As you will see from Mr. Daley's letter, a laminated structure, involving an opaque element, such as metal foil, is not believed to fall within the enforceable scope of Charch & Prindle. The product is, therefore, outside the scope of the Sylvania Agreement, but if we should

be informed by Reynolds Metals that a moistureproofing coating was to be used, we would be in position to grant Reynolds any licenses they might require under patents specific to the moistureproofing composition, the Charch & Prindle patent being excluded from this consideration. The terms of such a license would not necessarily be governed by any of the terms of the Sylvania Agreement. In adopting such a position, we would run the risk that Sylvania would disagree with our interpretation of the scope of Charch & Prindle and the scope of the Sylvania Agreement.
Should any controversy arise, it could doubtless be settled by
6013 adjusting our license to Reynolds or by making available to
Sylvania, for that particular product, license terms identical with those available to Reynolds, if Sylvania and we agree that the Reynolds terms were more favorable than those already provided by the Sylvania Agreement.

"At this point, it is probably well to observe the distinction between a laminated structure involving an opaque member and a similar laminated structure involving only transparent members. The latter type of structure might well fall within the scope of the Charch & Prindle patent and, therefore, within the scope of the Sylvania Agreement. Should we, at some time, desire to sell PT cellophane destined to enter into such a combination, it was agreed that specific consideration would have to be given and a different conclusion might be reached.

"With respect to the possibility of licensing converters like Reynolds Metals Company under certain of our moistureproofing coating composition patents, you indicated that, if the occasion should arise, in all probability, a license would be made available to the converter on terms which would not jeopardize our relations with Sylvania.

"During our discussion, we pointed out that once we permit an implied license to run with the sale of our PT cellophane, our ability to enforce moistureproofing coating composition claims in any of our patents diminishes practically to zero. This situation
can be corrected, however, by granting specific licenses to
6014 those who have been operating under implied licenses before
attempting to assert the patent. Here again, if any controversy should arise involving the Sylvania Agreement, it could be settled by suitable adjustment of the royalty provision in conformance with the Sylvania Agreement."

From that letter I submit that it is apparent that the Du Pont-Sylvania relations continue to effect Du Pont's ability to permit third parties to operate under Du Pont moistureproof
patents.

6015 There is one final very short letter here, your Honor,
Government Exhibit 2722 at page 3571, which is offered

in evidence. This is a letter from Mr. Charles F. Daley to Mr. F. M. Prall, July 18, 1945.

(The letter from Charles F. Daley to Mr. F. M. Prall dated July 18, 1945, was received in evidence and marked "Government's Exhibit No. 2722.")

Mr. MINICUS. (Reading.) "Re: Reynolds Metal Company—Laminated Structures.

"With reference to your letter of July 14, 1945 to Mr. R. L. Richards and confirming our recent telephone conversation, I understand that in the second last paragraph of your letter, your reference to 'terms which will not jeopardize our relations with Sylvania' was intended to refer only to safeguarding our royalty from Sylvania. This meaning conforms to your reference elsewhere in your letter to the Sylvania Agreement."

I believe that this correspondence——

Mr. GESELL. Read the rest of the document.

Mr. Smith has written on it "Right," with his initials.

Mr. MINICUS. You can read that when you get up. That is a hand-written note.

This correspondence explains nothing, your Honor, because it is obvious from the foregoing that the relations
6016 which now hinder the open licensing of moistureproof
patents are built about royalty situations. The mutual consent clause is gone; the exclusive licensing is gone; and now we have to feel around with this peculiar royalty provision in this favored nation clause which Mr. Gregg wanted to substitute almost ten years ago for the mutual consent clause.

The record clearly establishes that neither Reynolds nor anyone else acquired rights under these patents on January 1, 1945, to the date of filing the complaint.

The COURT. What is the number of the exhibit?

Mr. MINICUS. No. 2722, sir.

Mr. GESELL. Your Honor, I would like to deal with this subject before we close up this afternoon, unless your Honor is impatient to get away.

The COURT. I have had a week of it. How long are you going to be?

Mr. GESELL. I can deal with it Tuesday morning just as well.

The COURT. All right. This case will be adjourned until Tuesday, May 1, 1951, at ten-thirty; and remember Daylight Saving Time.

(At this point the trial was adjourned to Tuesday, May 1, 1951, at 10:30 o'clock a. m., Eastern Daylight Saving Time.)

* * * * *

6023 Tuesday, May 1, 1951, 10:30 O'clock A. M.

Present: As before noted.

Mr. Gesell. The issue, your Honor, which was tendered by the Government at the close on Friday related to the agreement of January 1, 1945, Exhibit 2755 at page 3642 of the exhibits, which was the exhibit between Du Pont and Sylvania, terminating any executory provisions, putting the agreement on a non-exclusive basis and changing the basis of the royalties.

Your Honor will recall that prior to January 1, 1945, the contract, though different in terms throughout the period, was exclusive in fact, the April 26, 1933 contracting being non-exclusive with a provision prohibiting licensing to third parties without the consent of the license. And then on July 12, 1938, the contract was put on an exclusive basis.

The issue tendered by the Government relates to paragraph 10 of the January 1, 1945 contract. That paragraph is, as I read it, the usual most favored nation clause. It is brief and I will read it. It says: "In the event that either party hereto shall grant to another a license of the character and scope granted in this agreement under terms more favorable than those herein
provided for, the licensing party shall notify the other
6024 party to this agreement within sixty days and said other
party to this agreement shall have the privilege upon
written notice given to said licensing party of substituting the essential terms of such other license in place of the essential terms of the license herein granted."

The Court. For my own education, what is the genesis of that clause?

Mr. Gesell. I don't know, but I have assumed it had a genesis in treaties or in international agreements which provide that in the event any other party, any other nation gets different treatment, particularly as to tariffs, let's say, or something of that sort, that then the same agreement will be given to other subscribing parties. These being non-exclusive licenses under the January 1, 1945 contract, your Honor will appreciate that the only effect of this paragraph 10 was that in the event duPont were to license someone else under a patent at a lower royalty than the royalty being charged Sylvania, that then Sylvania could invoke this provision and insist on a reduction of its royalty—a very
customary situation in patent license agreements.

6025 So that whenever Du Pont was confronted with the question of whether it would license a patent that was licensed to Sylvania under this agreement to someone else, it had to consider the royalty provision, and the documents which were read by the Government pertain to one situation of that kind involving Reynolds, and relates solely to this problem of royalties.

The suggestion that because there were references to the Sylvania agreement in connection with the licensing or consideration of licensing to Reynolds, that there was some insidious, over-all understanding broader than the contract or that the old contract had some continuing effect or, as it was put, there must be doubts as to the accessibility of these patents to third parties, we think is not in accordance with the documents. The consideration which was being given was only to the effect of the royalties that might be charged to Reynolds in relation to the royalties that were charged Sylvania under the agreement, and the necessity of recognizing that there was a provision in the Sylvania agreement which assured them of getting at least as low royalty as was charged to anyone else. In fact, the basic document which leads off this group I think makes it quite clear in the third paragraph, Exhibit 2512, a Du Pont document, where it is stated:

> "Now that Sylvania has only a non-exclusive license under our several patents, we are certainly free to license Reynolds if
> 6026 there is a need and if we wish to do so. If the Reynolds' operations comes within the scope of Sylvania's agreement we would need to charge them a royalty at least equal to that paid by Sylvania."

So we say again, as we have said concerning this contract from the beginning, that the contract itself embraces the entire terms of the understanding, and that there was no other understanding broader than the written terms of the agreement.

We are criticized for referring sometimes to the agreement rather than referring to the patent. But I submit, your Honor, that when the agreement licenses a patent if we refer to the effect of the agreement we are referring to the fact that our patents were licensed in a manner which affects our right with respect to licensing of others or the royalties we can charge to others, and that by referring to the agreement rather than to the patent we are not referring to anything broader than the patent license agreement itself.

Mr. Minicks. As to the terms of the agreement and agreements themselves, the Government has very little to take issue with what Mr. Gesell has said. The Government is simply maintaining that this is an unlawful pooling of patents. What is a patent pool? A patent pool entails cooperative use of patents by independent owners of those patents, whether it be by cross-licensing or transfer of title or appointment of a trustee. The patents are made available to everybody in the industry.

When does a patent pool become illegal? A pat-
6027 ent pool becomes illegal only when the members of that pool are dominant in the industry. That is clear from the cases. And these people are dominant. It also becomes illegal—

it needs another element when the intent and purpose and effect is to keep everybody else out. These patents are for that little dominant group and for that little dominant group alone, and they are tied up in such a manner that they are inaccessible to everybody else.

The Court. What if it was an open end type of agreement?

Mr. Minnich. We have such an agreement, your Honor, in the automobile industry and in the aircraft parts industry. Those pools have never been considered by any court, but they were considered quite at length by Congressional Committees, and in those instances there was found to be nothing wrong. In fact, it was found to be quite beneficial both to the industry and to the public. In the automobile patent pool, for example, everything in the automobile industry came into the pot and every manufacturer has always had access to those. It is true that Ford never wanted to get into it, but all the rest were in there and they put their patents in and they were there available to anybody else who either came into the industry or was already in the industry. The aircraft parts pool is very similar.

6028 Now, the only thing we pointed out at the close of the session Friday was that here again we have duPont so entangled with Sylvania that there is a block on its free and open negotiation of its own patents, just as there was in 1933 in that non-exclusive exclusive license. There the licenses were called non-exclusive, the agreement says they were non-exclusive, but mutual consent was necessary there. Anything that duPont wanted to do with these patents of its own it had to sit down and confer with Sylvania. Terms of royalty, term of the license, any minutiae connected with any license that might go to someone else would have to be talked over between the two dominant co-operating patent owners.

In 1938 that was all changed. The license then became exclusive, expressly so. So at this time it was necessary for them to sit down and talk over all the minutiae again as they did when the Marathon license was made. So nothing changed.

Now we come to January 1, 1945, and there is a new agreement. This time it is all non-exclusive. The only stumbling block appears to be the section that Mr. Gesell discussed and read this morning. That is quite a common form of the most favored nation clause. Ordinarily it is quite innocuous. And that was the one proposed by Mr. Gregg exactly ten years before as a substitute for the mutual consent clause.

6029 Now, with this new non-exclusive agreement it still is apparent from the Reynolds incident that duPont has not been able to disentangle itself from any relationship with Sylvania. And I submit to the Court that in the light of the past practices of these two corporations covering a 12-year period, that any persistence of that entangling alliance is one to be viewed with grave suspicion. Certainly here again in the Reynolds incident there is no doubt that the availability of a license and the terms of the availability to Reynolds were influenced not alone by the patents but by the fact of the Sylvania agreement of January 1, 1945.

I would like to pass from this subject of moistureproof cellophane. Perhaps we can get greater light on the matter if we look to other patents in the field.

The Government's position is that the monopolistic aims of the defendant have been completely exposed in this combination of the moistureproof patents. This combination was achieved in such a manner as to render the patents inaccessible to persons outside the industry and at the same time to suppress competition within the industry. The identical design is reflected in the defendant's activities with regard to patents other than those reading on moistureproof cellophane.

Counsel for the defendant has pointed up the fact that the bulk of the monopolized business is in moistureproof sheeting. Carrying this thought further, the Government exhibits have illustrated that the ascendancy of that product has been to a 6036 degree at least the result of forcing by duPont. There are, however, other products within this monopoly, and as to these the patent coverage is admittedly not basic. Nevertheless, the exhibits now to be introduced will demonstrate that the practice as shown to have been exercised under the moistureproof patents was reiterated time and again with regard to patents relating to other products.

Thus as stated at paragraph 102 of the Government's trial brief defendant has manifested its monopolistic purposes by further recourse to devices comprising licenses or cross-licenses to Sylvania or Celon. These licenses or cross licenses have been coupled with restrictions on the right of the respective patentees to grant licenses to others outside the industry, with respect to patents relating on products of regenerated cellulose other than moistureproof cellophane.

For proof of this proposition we direct attention first to a licensing arrangement between Du Pont and Sylvania which manifests on a smaller scale several of the restrictions existing under the moistureproof agreement. It will be established that Du Pont and Sylvania entered into an agreement on October 22, 1937, which provided for the cross licensing of certain United States Letters Patent relating to a sheet base as of cellophane impregnated or coated with a composition containing an ultraviolet light

absorbent, thereby enabling the sheet to be used as a pro-
6031 tective wrapping for commodities subject to rancidity when exposed to sunlight. Said cross-license arrangement has had the effect of extending the community of interest previously established between Du Pont and Sylvania by virtue of the agreement of April 26, 1933.

It will further be shown that this cooperative effort involving patents owned by the only two producers in the field had a dual motivation: One, to enable both to work the patents thereunder. Whereas this is a reasonable and common basis for cross licensing it will be noted that in this instance Du Pont while considering both patents probably invalid again required the usual acknowledgements of validity. And two, that a purpose here was very definitely to keep all others out of the field. This is unquestionably an unlawful motivation for cross licensing between dominant patent owners and we maintain that it negatives the first purpose as stated as a ground for justification.

The Government offers in evidence Government Exhibit 2829, appearing at page 6098.

(Memorandum from W. W. Smith to Messrs. M. duPont Lee and J. E. Hatt dated October 21, 1936, was received in evidence and marked "Government's Exhibit No. 2829.")

Mr. Minicus. This is correspondence from Mr. W. W. Smith of the Patent Service Department, duPont Company, to Messrs. M. duPont Lee and J. E. Hatt, dated October 21, 1936.

"As we advised you in our letter of October 20, 1936, we
6032 have been formally advised of the allowance of the Hunter application. Knowing your wishes regarding the immediate issue of the Hunter case, we are paying the final fee immediately, seeking ratification of this move by the Patent Board at their next meeting.

"At the time of allowance, it is our usual custom to discuss the relation, if any, of the allowed case to our Sylvania agreement. In anticipation of the immediate issue of Hunter, we believe it will be wise to consider this point so that our position will be established when the patent issues.

"You will recall that the Sylvania patent (Morgan) 2,013,860 relates to light protective wrappers which fall within the scope of the claims which have been allowed in our Hunter case. In our letter of July 10, 1936 relative to the alleged infringement of this Sylvania patent, we stated that the Morgan patent was outside the scope of our Sylvania agreement. As a matter of justice, in view of the nature of the Hunter invention, we believe that Hunter is also outside the scope of the agreement. There is a difference between Morgan and Hunter however in that the former makes no mention of moistureproofing compositions and the claims of the patent do not relate to moistureproofness, or to the combina-

tion of a moistureproofing composition with regenerated cellulose. Hunter, on the other hand, describes in his specification the utility of the invention in combination with moistureproofing proc-
6033 esses and compositions and two of the claims actually recite the presence of a moistureproofing coating.

"A literal interpretation of the agreement might therefore dictate that inasmuch as the claims are concerned with the manufacture of a sheet or film of regenerated cellulose combined with a moistureproofing composition, either directly or by implication from the specification, the patent should fall within the agreement and Sylvania should be entitled to a license thereunder. It should be remembered however that the Hunter invention is not one which turns about the moistureproofing operation or a coating composition especially suited for moistureproofing purposes. The disclosure of moistureproofing compositions in Hunter merely shows how the invention can be applied to advantage in conjunction with already known moistureproofing compositions.

"Considerable discussion of this point arose in the conference on the Sylvania contract, held in New York December 31, 1935 and we attach excerpts from our notes on this conference in support of views which may govern our decision at this time. At that time Mr. Yerkes was of the opinion that our Sylvania agreement would require licenses only when the invention involved was intimately tied up with the moistureproofing.

"Accordingly, we believe that the Hunter case should be considered as falling outside the scope of the agreement and
6034 while it is quite possible that Sylvania will disagree with this position, we feel that we should be prepared to argue strenuously in support of it. We really believe that the best way to handle this case it to do so outside the agreement, endeavoring to secure from Sylvania royalty free licenses under Morgan and Joseph patents in return for a royalty free license under Hunter which dominates both of the Sylvania patents, as outlined in our letter of September 15, 1936."

6035 So by this document we see the issuance of the Hunter patent to Du Pont and the fact that the pre-existing patent to Sylvania reads upon certain claims of this Hunter patent, the Sylvania patent being the Morgan patent, and the recommendation then that a consideration be given to a cross-license of Morgan and Hunter.

The Government offers in evidence Government Exhibit 2190 at page 2448. This is a memorandum by Mr. W. W. Smith of the Du Pont Patent Service dated May 27, 1937 entitled "Du Pont-Sylvania Cross License—Hunter U. S. No. 2,062,179—Morgan U. S. No. 2,043,860."

Government's Exhibit 2190

(The memorandum by Mr. W. W. Smith dated May 27, 1937, was received in evidence and marked, "Government Exhibit No. 2190.")

Mr. Minters. (Reading.) "Both of the above-identified patents relate to a sheet base, as of regenerated cellulose, impregnated or coated with a composition which contains an ultra-vilot light absorbent which enables the sheet to be used as a protective wrapper for commodities subject to rancidity development when exposed to sunlight or any source of ultra-vilot light.

"Morgan (U. S. No. 2,043,860), assigned to the Sylvania Industrial Corporation, covers a colored product having certain absorptive characteristics while Hunter (U. S. No. 2,062,179), assigned to du Pont, covers both colored and colorless products. Hunter practically dominates Morgan but theoretically it would be possible to practice Morgan without infringing Hunter. 6036

"Shortly after Morgan issued, June 9, 1936, we were advised of its issue and informally charged with infringement. We were able to show that the specific customer named by Sylvania as having been sold infringing material, had never received such. Some other customer might have been chosen, however, to whom infringing material was actually sold in the form of our light fast Tango 'Cellophane' film. A license under Morgan removes any further difficulties along this line."

It is our contention, your Honor, that the next paragraph discloses the motivation for the cross-license about to be considered. I continue reading:

"Realizing that neither Sylvania nor du Pont could freely develop the entire line of light protective wrappers, colorless and colored, without infringing the patent of the other and recognizing the probable invalidity of claims in both patents, we approached Sylvania with the proposition of a cross-license which would enable both of us to operate and at the same time keep others out of the field.

"The exploitation to date has been slight and present indications are that the volume of business will never be large. Cost of manufacture will require a premium price as a specialty and customers are not yet ready to pay this. We do make at the present time, however, a line of colored film which is Light Fast and some of these, Tango for example, meet the claims of Morgan. By virtue of a license under Morgan, we can continue with these colored films even though they are not specially designed as rancidity protective film. Active sale of this 6037 type of film has been suspended until execution of the license agreement.

"The license agreement is reciprocal, granting each party a non-exclusive, royalty free non-assignable license for the full scope and life of the patent to practice the invention in the patent of the other party, with the right to sublicense customers to use the light protective film in making articles comprising this film (i. e. wrapping articles, making containers or packages), whether the particular film is made under Morgan, Hunter or both.

Each party agrees not to license a third party to manufacture this ultra-violet light protective film without the consent of the other party to the agreement and in the event of such license any royalties are to be shared equally.

"In the event of infringement by a third party, Du Pont and Sylvania may join in suit or may sue individually in the name of the party owning the patent if the other refuses to join after due notice.

"No rights are conveyed under any other patents of either party. Each party acknowledges validity of the patent of the other.

"Although a moistureproofed regenerated cellulose film 6038 is disclosed as a species in both patents, the invention does not fall within the scope of the du Pont-Sylvania agreement of April 26, 1933. However, the royalty-free license under Hunter does not relieve Sylvania of the necessity for paying its proper royalty on a moistureproof species under that agreement. This is cared for in Paragraph 10.

"The licenses, although non-assignable, inure to the benefit of and are binding on the successors of the entire non-fibrous wrapping tissue business of both parties."

The Government offers in evidence Government Exhibit 2191 at page 2450. This is correspondence from Mr. B. M. May to W. W. Smith dated June 8, 1937 entitled "Cross Licensing Agreement with Sylvania Industrial Corporation under U. S. Patents Nos. 2,043,860 and 2,062,179—Ultra-Violet Light Protective Cellulose Film."

Government's Exhibit 2193

(The letter from B. M. May to W. W. Smith dated June 8, 1937, was received in evidence and marked, "Government Exhibit No. 2191.")

Mr. Minicus. (Reading.) "Referring to your letter of May 27th, transmitting revised proposed agreement under the above heading, this will confirm telephone advices of yesterday and today that H. C. Haskell, Acting Director of the Legal Department, will not approve this agreement in its present form.

"Article 5 on page 3 will be made satisfactory if the words—'for the duration of this agreement', or 'during the life
6039 of this agreement' are added to the end of this article.

"Article 6, Mr. Haskell feels, should be eliminated entirely, and this is concurred in by Messrs. J. E. Hatt and C. F. Daley."

I submit to the Court that the context of Article 5 and Article 6 will become apparent in the next two or three documents.

I continue reading:

"It is therefore, understood that before re-drafting the license agreement, you will again go over the matter with Dr. Wade, of Sylvania, explaining the situation to them, and the desire of our Legal Department to avoid any possible restriction as in Article 6 which might get us into trouble. You mentioned the intent of this article on Sylvania's part to take care of the situation of the Celluloid Company's apparent infringement of both of the above mentioned patents. Suggestion is made that this and any other cases might be handled amicably with Sylvania on a satisfactory basis without having to specifically cover the subject in an article such as the #6 that is now requested to be left out. Mr. Hatt suggests that he will be glad to discuss the matter with Dr. Wallach, of Sylvania, if Dr. Wade and you cannot agree as to the settlement of this issue."

6040 Now, it is the Government's position as to the paragraph read that there is a very definite indication in that paragraph that regarding this agreement at least there is some sort of an understanding outside of the terms of the agreement, and we say it is expressly set forth in this letter.

Continue reading:

"We trust, however, that you will be able to reach a satisfactory conclusion with Sylvania and submit to us revised form of agreement which will meet the approval of the Legal Department."

The Government offers in evidence Government Exhibit 2192 at page 2451. This is a letter from Mr. Worth Wade of the Sylvania Industrial Corporation to W. W. Smith, dated June 30, 1937: The heading again refers to the Du Pont-Sylvania cross-license, Hunter v. Morgan.

(Letter from Mr. Worth Wade to W. W. Smith dated June 30, 1937, was received in evidence and marked "Government's Exhibit No. 2192.")

Mr. Minicus. Begin reading:

"We acknowledge receipt of your letter of June 14th and regret to note that the proposed agreement under the above identified patents was not acceptable to your Legal Department.

"With respect to the change of the article relating to validity, we agree to the addition that the acknowledgment of validity

and the agreement not to contest the same will run
6041 only for the duration of the agreement.

"With reference to the proposed elimination of the article regarding licensing of third party manufacturers, we wish to say that we understand the position which your Legal Department has taken and we appreciate the reasons for their objections to this paragraph. We believe that their chief objection arises from the fact that the article implies a mutual agreement between Du Pont and Sylvania to restrict the number of licenses to third parties. It appears, however, that this objection arises solely from the manner in which this article has been set up, that is, from the fact that both patents are covered in the same paragraph. In the moistureproofing agreement dated April 26, 1933 between Du Pont and Sylvania, you will find a provision that Du Pont agrees not to license third parties to manufacture moistureproof materials without the written approval of Sylvania. We believe, therefore, that such a restriction, if applied only to your own patents, is not inconsistent with the policy of your company.

"Accordingly, we suggest that the article regarding third party licenses should be divided into two articles as proposed on the attached sheets. Our Legal Department is of the opinion that there can be no valid attack of the paragraphs given on the attached sheets because the obligation is restricted in each case to the patent owned by the licensor.

6042 "In resubmitting the revised paragraphs on the attached sheet to your Legal Department, we suggest that you call their attention to the fact that similar paragraphs were approved and embodied in the Du Pont-Sylvania moistureproofing agreement above mentioned.

"Trusting that the above suggestions will meet the full approval of your administration, we look froward to receiving the executed copy of the proposed agreement in the near future."

The last two pages to this exhibit are copies of the proposed changes of Article 6 as submitted by the Sylvania Corporation. Sylvania pointed out they are reciprocal. An illustration of one will apply to both. In this it is set forth that Sylvania agrees that no license under Morgan will be given without the mutual written approval of Du Pont, and it is understood, however, that Sylvania may license or sub-license its customers under said Hunter and Morgan patents. Then the other one is reciprocal back from Du Pont and requires the consent of Sylvania.

The Government offers in evidence Government Exhibit 2193 at page 2155. This is a letter from W. W. Smith to Dr. Worth Wade of Sylvania Corporation dated July 13, 1937. The heading again indicates that the correspondence is addressed to the proposed Morgan and Hunter cross-license.

Government's Exhibit 2193

(Letter from W. W. Smith to Dr. Worth Wade dated July 13, 1937, was received in evidence and marked "Govern- 6043 ment's Exhibit No. 2193.")

Mr. MINNICUS. It reads:

"Immediately upon receipt of your letter of June 30, 1937, in the above subject, we passed it on in its entirety, together with its attachments, to our Management and Legal Department.

"We are now advised that your proposal to split the article in the agreement regarding licensing of third party manufacturers into two articles, is still unsatisfactory to the Legal Department, and the latter are still firm in requiring the elimination of the article before accepting the agreement.

"We believe that the elimination of this article will in nowise be detrimental to the interests of the parties. Each case, we are sure, can be handled on the basis of its own merits as and when it shall arise. Our personal reaction is that the relative unimportance of the subject matter, which both of us have recognized, is such that we can justify elimination of the article and thus bring the remainder of the agreement into being and reserving the present point at issue for future discussion as occasion shall demand."

Here again are quite positive expressions of some understanding over and above what these parties are going to write into the agreement.

Continue reading:

"May we suggest, therefore, that you reconsider your 6044 position with regard to this article with the hope that we can soon forward to you an agreement which will be satisfactory to both of us."

At the top of this correspondence is a hand-written note the significance of which is not immediately apparent but will become apparent within the reading of about two more documents. The first hand-written note is dated 7/30/37: "F. M. P. phoned W. W. S. who was in Wil. (I presume that means Wilmington) that Sylvania suggested a wording, which W. W. S. reviewed with Haskell & Biesterfeld. They agreed subject to Gregg's approval."

The next note is dated 8/3/37: "Daley obtained Gregg's acquiescence and will re-draft Article 6 accordingly. Phoned F. M. P."

The Government offers in evidence Government Exhibit 2194, appearing at page 2456. This is a letter from Dr. Worth Wade of Sylvania Corporation to E. I. du Pont Nemours & Company dated July 28, 1937. The heading continues the subject matter.

Government's Exhibit 2194

(Letter from Dr. Worth Wade to E. I. Du Pont de Nemours & Company, Inc., dated July 28, 1937, was received in evidence and marked "Government's Exhibit No. 2194.")

6045 Mr. MINICUS. (Reading.)

"After careful consideration of your letter of July 13th relative to the above matter, we are at a loss to understand the reasons lying behind the refusal of your Legal Department to approve the proposed paragraphs regarding the licensing of third party manufacturers.

"In our previous conversations it was mutualy agreed that the claims of the Hunter and Morgan Patents were so overlapping in scope that it was deemed advisable to cross-license our respective companies for the purpose of avoiding manufacturing difficulties and possible questions of infringements. You must recognize that these same arguments would apply to a third party manufacturer who might become licensed under one of these patents without being licensed under the other. Accordingly, it appears advisable that the proposed agreements should provide means whereby third parties can be licensed under both patents. It is obviously of mutual benefit that each party should be aware of intent by the other to license a third party manufacturer, both because the entrance of a third party manufacturer might have a disturbing effect upon the commercial exploitation of the patented articles and because a third party licensed under the one patent and not licensed under the other might produce an article which would constitute infringement of the patent not licensed thereto. Accordingly, we suggest that you ask for reconsideration of the

6046 paragraphs submitted with our letter of June 30th.

"You may wish to consider a revision of our proposed paragraphs which would omit the expression 'mutual written approval' and substitute therefor 'notice in writing of the name of the party 30 days before said intended license shall take effect.' Such notice, in the opinion of our legal department, should not be construed as a restraint of trade. Such notice would give the other party to the present agreement an opportunity either (a) to offer a license to the party which the other intends to license, or (b) to consider the question of infringement so that its rights may be protected.

"Since we have made several suggestions in an earnest endeavor to meet the approval of your Legal Department, we believe that future suggestions in this matter should be made by you. The writer wishes to state, however, that the administration of this company is opposed to executing the proposed cross-license agreement without some protection against licensing of third party manufacturers."

Now, referring back to the hand-written notes read in the previous exhibit, it is submitted; it will become increasingly apparent, that it is this last proposal of Sylvania's that the Du Pont Legal Department approved in those hand-written notes.

The Government offers in evidence Government Exhibit 2195 appearing at page 2158. This is a letter from W. W. Smith 6047 to Dr. Worth Wade. The heading contains the subject matter, and the date is August 3, 1937.

(The letter from W. W. Smith to Dr. Worth Wade dated August 3, 1937, was received in evidence and marked, "Government Exhibit No. 2195.")

Mr. Minicus. (Reading.)

"We thank you for your letter of July 28, 1937, in the above subject and wish to say that we are in accord with your views regarding the nature of the Hunter and Morgan patents and the advisability of providing means whereby third parties can be licensed under both patents.

"The suggested revision which you have made in the third paragraph of your letter appeals to us as offering a solution to the problem in hand. As we have pointed out in previous correspondence, our Legal Department is particularly anxious to avoid any terms in an agreement which might be construed as an attempt at restraint of trade. They are anxious to eliminate any terms which might even hint at possible connivance in this direction. Thus, it might be held that our agreeing to make the licensing of a third party manufacturer contingent upon mutual consent would give rise to a situation wherein at all times one of us would be unwilling to grant that consent. Obviously, it is not the intention of either of us to set up such a situation but we believe that you will agree that neither of us would wish to have an agreement which could be easily misconstrued by any outside party."

6048 In light of that paragraph—and this is a letter to the Sylvania Corporation by Mr. Smith—I refer the Court to Mr. Smith's own words in writing a memorandum within the Du Pont Company which we previously introduced in evidence with regard to this subject matter, and that was Government Exhibit 2190, the last sentence in the fourth paragraph:

"* * * we approached Sylvania with the proposition of a cross-license which would enable both of us to operate and at the same time to keep others out of the field."

The Court. I can't reconcile those two points of view. Which shall I select?

Mr. Minicus. I think the documents read so far make it quite obvious what has happened here, your Honor. In the course of

the negotiations between Du Pont and Sylvania originally drafts were submitted, and in regular Du Pont Company procedure they had to be approved by the Legal Department. Now, the Legal Department found the inclusion of such things as mutual consent clauses and the two reciprocal clauses proposes by the Sylvania Corporation as obnoxious, as indicating restraints of trade, and would not pass them. It seems to me clear from all these statements in here by the Du Pont Company that "We can get these clauses out; we can settle this thing between us as the occasion arises" that the intent was to find wording that would cover what they wanted to do and at the same time would not be expressly violative of the Sherman Act. In other words, that the intent
6049 as originally expressed by one Du Pont official writing to
another that the purpose here was to keep all others out was the intent that carried right through this agreement, and all the rest of this is merely a discussion of terms.

6050 The Government offers in evidence Government Exhibit 2196 at page 2460. This is a letter from W. W. Smith to Mr. F. G. Hess dated August 6, 1937, the same subject matter.

Government's Exhibit 2196

(Letter from W. W. Smith to F. G. Hess dated August 6, 1937, was received in evidence and marked "Government's Exhibit No. 2196.")

Mr. Minicus. (Reading.)

"In accordance with our promise in the postscript of our letter of August 3, 1937, in the above subject, we are sending you herewith new pages which should be substituted for the correspondingly numbered pages in the license agreement forms which we submitted to you with our letter of May 27, 1937.

"These revised pages embody in Article 5 on Page 3 the suggestions of the Legal Department, as expressed in your letter to us of June 8, 1937.

"These revised pages also substitute for Article 6 of the earlier draft, the two articles numbered 6 and 7, the remainder of the agreement being the same except for the renumbering of subsequent articles. The two new articles numbered 6 and 7 are reciprocal and merely require that neither party to the agreement will license a third party to manufacture the material covered by the party's own patent without giving notice in writing to the second party of the name of the third party 30 days before the proposed license is to take effect. It is to be noted also that
6051 the provision to share royalties in the event of a license
granted to a third manufacturer has been deleted.

"We presume you will proceed to secure formal approval of the final complete agreement preparatory to execution of it by the proper authorities. In the meantime, we are sending a copy of the two new paragraphs to Dr. Wade of Sylvania in the hope that we can secure his reaction immediately so that if there appears to be no objection on the part of Sylvania, you can proceed to have the document executed and then submit it to Sylvania for signature if that appears to be the desirable procedure."

The Government offers in evidence Government Exhibit 2197 at page 2464. Among other things this document contains a description of the agreement, and by reading this document we will be able to avoid a reading of the agreement itself. This is a report from Mr. L. A. Yerkes to the Executive Committee dated October 18, 1937, with the same sub-heading as all the previous documents contained.

Government's Exhibit 2197

(Memorandum from L. A. Yerkes to Executive Committee dated October 18, 1937, and attachment, was received in evidence and marked "Government's Exhibit No. 2197.")

Mr. MINICUS. (Reading.)

"Recommendation is made for authorization to enter into the above-mentioned agreement, draft of which as approved by the Legal Department is attached, together with an abstract 6052 of the agreement.

"Our interest lies in the marketing of 'Cellophane' film, impregnated or coated with an ultra-violet light absorbent, for use as a protective wrapper for commodities subject to rancidity development when exposed to sunlight or any source of ultra-violet light. Potato chips is an example of such an article.

"While our U. S. Patent No. 2,062,179 is believed to practically dominate Sylvania's U. S. Patent No. 2,043,860, it would be theoretically possible to practice Sylvania's patent without infringing ours.

"Realizing that neither Sylvania nor du Pont could freely develop the entire line of light protective wrappers, colorless and colored, without infringing the patent of the other, and recognizing the probable invalidity of claims in both patents, we suggested to Sylvania a cross-licensing arrangement. They have indicated approval of agreement substantially in the form attached.

"The exploitation to-date has been slight and present indications are that the volume of business will never be large. Cost of manufacture will require a premium over the regular price as a specialty and customers are not yet ready to pay it. We have, however, not actively pushed this development pending settlement of the proposed cross-licensing agreement with Sylvania. We believe it will be advantageous to conclude this 6053 agreement with them."

(Mr. Miniclis reading from attachment:)

"Abstract of Cross-licensing Agreement With Sylvania Industrial Corporation Under U. S. Patents Nos. 2,043,860 and 2,062,179—Ultra-violet Light Protective Cellulose Film

"Parties: E. I. du Pont de Nemours & Company and Sylvania Industrial Corporation, and the successors of the entire non-fibrous wrapping tissue business of these parties.

"Subject: Both of these patents relate to a sheet base, such as regenerated cellulose, impregnated or coated with a composition containing an ultra-violet light absorbent.

"Sylvania's U. S. Patent No. 2,043,860, issued June 9, 1936, covers a colored product.

"Du Pont's U. S. Patent No. 2,062,179, issued November 24, 1936, covers both colored and colorless products.

"Licenses: (a) Du Pont and Sylvania exchange non-exclusive, non-assignable licenses to make, use and sell the products described and claimed in above-mentioned patents, throughout the United States, its territories and dependencies.

"(b) Du Pont and Sylvania to have the right to sub-license their customers to use ultra-violet light protective material
6054 as defined in these patents, in the making of articles comprising said material, and to sell such articles, throughout the United States, its territories and dependencies.

"(c) Du Pont and Sylvania agree not to grant license under their own patent to a third party to manufacture ultra-violet light protective articles defined in said patent, without giving each other notice in writing of the name of such third party 30 days before said license is to take effect. This does not apply, however, to licenses to customers of Du Pont and Sylvania as outlined in (b) above.

"(d) Du Pont and Sylvania acknowledge the validity of each other's patent, and agree not to contest the same for the life of this agreement, i.e., the life of each patent, or any reissue or extension thereof.

"(e) The cross-licensing of these two patents is royalty-free with respect to non-moistureproof cellulose film, but neither party is relieved from payment of such royalties covering utilization of these patents in connection with moistureproof cellulose film as are required by the main agreement between du Pont and Sylvania, dated April 26, 1933, and licenses issued supplemental thereto since that time.

"If du Pont's U. S. Patent No. 2,062,179 is utilized by
6055 Sylvania, however, with moistureproof cellulose film, at least the basic royalty of 2% of net sales called for under the main 1933 agreement will be payable to du Pont, the 4%

royalty to apply if certain of the supplemental licensed patents are used.

"If du Pont utilizes Sylvania's U. S. Patent No. 2,013,860 in the production of moistureproof cellulose film which also involves other patents of Sylvania, already licensed to du Pont, it is possible that du Pont might be liable for royalty to Sylvania at 2% of net sales. Of the 5 supplemental licenses granted by Sylvania to du Pont, pursuant to the main 1933 agreement, 2 are royalty-free, and 3 carry the basic 2% rate."

6056 The Government offers in evidence Government Exhibit 2198 at page 2463. This is the license agreement dated October 22, 1937 wherein the cross-licensing of the Hunter and Morgan patents was accomplished by Du Pont and Sylvania.

(The agreement between E. I. du Pont de Nemours & Company and Sylvania Industrial Corporation dated October 22, 1937, was received in evidence and marked, "Government Exhibit No. 2198.")

Mr. Gesell. As we go through these various license situations, your Honor, I am going to try to give some indication of what the subject matter is, because I think it may add to an understanding of the documents.

Here is a piece of a type of cellophane, rancidity protected cellophane. That is a moistureproof variety which I have handed up to the Court, which is referred to in many of these documents as "Tango" because of the color. It is a specialty item that carries, as these documents show, a high premium.

The Government exhibits already in evidence show that in 1947 Du Pont's sales of this type of film are less than one-half of one per cent. of the dollar value of its total sales. That is from GX-396.

In the manufacture of the film the substance is put into the softener which makes the film impervious to the ultraviolet light rays, and the result of that is to stop rancidity in greasy products.

6057 The Court. You mean I would not get sunburned if I——

Mr. Gesell. That is right, your Honor. I don't know whether you ought to try it without my checking a little more.

But the main purpose of that type of film is to stop rancidity in greasy products due to the passage of ultraviolet light rays. For example, potato chips, which is given in these documents, is one in point.

As I say, from GX-396 this high premium specialty item accounted for less than one-half of one per cent. of the company's sales in 1947.

As I understand the situation, we certainly have here an agreement which is not subject to any criticism under the antitrust laws. Here are two conflicting patents, the Hunter and Morgan patents, and they are cross-licensed non-exclusively, royalty free, with no limitations upon the right of either licensing party to license others save the requirement of giving thirty days' notice and the name of the prospective licensee. So the agreement certainly is an agreement which in its four corners is not subject to attack.

As far as the agreement having an exclusionary effect is concerned, your Honor will find no evidence that anybody ever asked for a license under those patents, was ever denied a license under the patents, and I think our common sense tells us that no one desiring to enter the cellophane business would start out with
6058 the idea of manufacturing this high-priced specialty which
carries such a low volume in the business.

So that what I gather we are down to is a question of intent. Did this agreement mean something different than it said?

Addressing myself to that issue I would like to discuss the document. It is perfectly clear from Exhibit 2190, which was read on several occasions, and from the other documents, that there was a legitimate motive for entering into this agreement, and it seems to me that is the first question that one always looks to when dealing with a question of intent. We were being charged by Sylvania with infringing their patent, and as we say in 2190 and elsewhere, we wanted freedom so that we could go ahead and develop this business with our customers. That is mentioned at the beginning of these negotiations; it is mentioned throughout the documents; and it is mentioned at the end. So we do have a legitimate, proper motive for entering into the agreement.

The Government urges, however, that we had another motive, and that was to keep others from the field, and there is no question that in the internal memorandum in May 1937 Mr. Smith, who was not a lawyer, refers to the fact as one of the considerations for approaching Sylvania. He does not say that is something that was stated to Sylvania, but that it was one of the considerations for approaching Sylvania. But the agreement is not signed, your Honor, until fifteen months later.

6059 The Court. After his statement?

Mr. Gesell. After his statement. His statement is made in Exhibit 2190, which is dated May 27, 1937, and we find—no, I am in error, your Honor. It is the same year. We find it is not until August in Exhibit 2196, a matter of three months, rather than fifteen months, that the contract goes to Mr. Hess for signature. That is 2196 at page 2460.

Now, what happens in those intervening three months? The form of contract, which is not offered here, but we can tell its terms, is submitted in that three months to three different high ranking Du Pont counsel—Mr. Haskell, the acting Director, Mr. Biesterfeld. Mr. Daly also sees it, and in addition it is submitted to Judge Gregg, who was the company's legal adviser on anti-trust matters.

The Court. Where is he from?

Mr. Gesell. Judge Gregg was then employed by the company. I believe earlier he had been employed by the Government, your Honor, and was employed at this time by the company in its Legal Division.

All of those gentlemen to whom this matter was referred said, "You cannot have in this agreement a clause or a provision which will prevent the licensing of the patents without the two of you getting together and consenting to the license." Mr. Haskell said it, Judge Gregg said it, and the others said it, and that view was put to Sylvania and insisted upon, and the agreement did not contain any mutual consent provision.

6060 How do these things happen as an ordinary, sensible, business matter? The Government asks you to infer that there was some understanding beyond the agreement and that all of these various legal gentlemen who participated in it were participating with the idea of building up some camouflage to make things look right, knowing that the agreement was not going to mean what it said. It is stated that that is the Government's belief, but I submit that the belief must be supported by some evidence. It is clear that the determining voice in the formulation of the terms of this agreement were the duPont attorneys. And there is no evidence that they were engaging in some kind of hugger-mugger here for the purpose of fooling somebody.

We have, your Honor, a further document that throws light on this and leaves in my view no doubt as to the seriousness with which the Legal Division approached this problem and their insistence. You will have noted that as the exhibits were read, at Exhibit 2193 reference was made to the discussions with Judge Gregg in the latter part of July, and those discussions took place after Sylvania in Government Exhibit 2192 had called attention to the fact that there was a mutual consent provision in the main moistureproof cross-license, and they sort of put it to Du Pont, "Well, how can you take that position here in these ultra-violet patents when our main agreement contains a mutual consent provision?"

Your Honor will find that Exhibit 2496, al-
6061 ready in evidence and offered some time back, shows that when this matter was brought to the attention of Judge Gregg, he took the view that an amendment of the main agreement was also necessary, and as we have it in evidence that agreement was amended in the following year.

So it seems to me on the evidence that the position of the Du Pont Legal Division was firm and clear and consistent and that whatever may have motivated Mr. Smith in approaching the question of a cross license, that motivation found no reflection in the contract.

Then the only question remains is, why was a notice provision put in the contract? True, the mutual consent is clearly out, but why was the notice provision put in the contract? At Exhibit 2194 we have a clear statement by Sylvania as to why they wanted it. They pointed out that if Du Pont licensed under its patent to someone else, that license might be an infringer of Sylvania's patents and they wanted an opportunity to take up the question of offering a license to the same person under their patents which conflicted.

Throughout these documents, in the report to the Executive Committee, at the end, and in the discussions before, we see Mr. Yerkes, representing the Management, as opposed to Mr. Smith, a technical man in the Patent Service, saying, "Our interest—" this is what he put to the governing body of the company—"Our
6062 interest lies in the marketing of cellophane film," and he
says, "We realize that neither Sylvania nor Du Pont can freely develop the entire line of light protective films without infringing the other patents, and this gives us freedom."

There is no suggestion to the Executive Committee of any kind that this agreement had any other purpose at the time it was executed than to carry out a cross license, non-exclusive, royalty-free, each party retaining the right to sub-license, so that both companies would have freedom to develop this specialty.

Mr. Minicus. If your Honor please, as to the fact that there is less than one per cent of the business involved here, we readily confess that the business was small. There are going to be other agreements coming along this morning, licensing agreements, in which the business is small. We must remember Mr. Gesell has stressed that 80 per cent of the business in sheeting represents moistureproof. We have just spent over a week covering that whole problem. We take that 80 per cent from 100 per cent and we only have a few one's and half of one per cents left to deal with. That is our purpose here. Our purpose here is to show that the restraints, exclusions and suppressions existing in the moistureproof agreement were not confined to that. That is all we are showing, that this extended over and beyond that into the entire realm of Du Pont's patent licensing arrangements.

6063 It is true that the very mutual consent considerations that
Mr. Gregg found obnoxious and would not approve as to this contract were in the moistureproof contract. And they stayed there, even after the exclusion of this agreement. They stayed there for one year after Mr. Gregg complained against them. Why? Because these management people who have suddenly be-

come very unimportant in the Du Pont Company would not take the recommendation of the lawyers.

Mr. Gesell has stated that we have asked the Court to draw an inference that beyond the bare terms of this agreement there was an understanding. We have asked no such thing. We have just asked the Court to look at Mr. B. M. May's own statement—admittedly Mr. May was not a lawyer either; Mr. May was only the Assistant General Manager of the Rayon Department, and Mr. May here was writing to this Mr. Smith who was not a lawyer, and he also sent copies to Mr. J. E. Hatt and Mr. M. duPont Lee and none of those was lawyers either. They were just people who were running things over there. And what did Mr. May say in Government Exhibit 2191? "Suggestion is made that this and any other cases might be handled amicably with Sylvania on a satisfactory basis without having to specifically cover the subject in an article such as the No. 6 that is now requested to be left out. Mr. Hatt suggests that he will be glad to discuss the matter with Dr. Wallach, of Sylvania, if Dr. Wade and you cannot agree as to the settlement of this issue."

6064 There is no inference necessary. The Government is not asking any inference. Mr. May has stated, and he said to this Mr. Smith, who is apparently not a lawyer, perhaps not very important, to get together with Dr. Wade, who is a lawyer; he is up at Sylvania, and see if they could settle this thing so that the terms would not be necessary, and if they could not, move it up to a little higher echelon, and Mr. Hatt and Dr. Wallach would get together. We are not asking the Court to draw any inferences. We are just asking the Court to accept this as evidence of the statements of the people who were carrying on these negotiations, who had the authority to carry on and approve them, and the statements were made co-temporaneous with the negotiations themselves.

6065 Now, there is going to be quite a few of these licenses introduced here this morning, and the Government is not so hopeful as to take the position that we are going to find at the bottom of each letter just above the subscribing signature a statement "The purpose of this is to keep others out." The Anti-Trust Division does not come across those statements very often any longer. When we find one it is rather an exceptional circumstance. The Supreme Court has realized that proof of an anti-trust case today must depend largely on circumstantial evidence. We have got to take these facts and relate them to other facts in the case and proof that has already been adduced, and then through a reasoning process, relating everything to the whole record, we have to make a reasonable assumption whether there is collusion and whether there is patent pooling designed to keep others out.

I will make no pretense now that in the rest of these licenses we are going to find many more such statements as Mr. Smith's.

Now, there was a Snyder patent license by Du Pont to Sylvania on May 20, 1942, and this related to the use of ethylene glycol as a softener or plasticizer for cellulosic films bearing a lacquer coating. This patent was deemed by Du Pont for some reason or another to be outside the scope of the moistureproof agreement and hence subject to separate negotiation. In other words, here is a patent
for a softener in films with a lacquer coating, and it is
6066 deemed to be outside, not within, the scope of this moisture-
proof agreement that we have been considering, so we are going to have a separate license for it now.

However, the exhibits to be introduced will show that operations under this license and all the facts concerning it were related and in many instances covered by the terms intended to—its terms were intended to operate substantially the same as those they applied under the agreement of April 26, 1933. This statement was true to the extent that those restraints previously demonstrated to have existed within that relationship must perforce apply to this patent. Also in these documents there is another document indicating that a further license, this time from Sylvania to Du Pont, the Reichel and Cornwell patent which was licensed thereunder, was also considered to be within the same category.

The Government offers in evidence Government Exhibit 2530 at page 3318. This is a report from the Rayon Department of the Du Pont Company to the Committee on Patents dated April 1, 1942. The subject is "License to Sylvania Industrial Corporation under Snyder U. S. Patent 2,087,008, expiring July 13, 1954."

(The report from the Rayon Department to Committee on Patents dated April 1, 1942, was received in evidence and marked, "Government Exhibit No. 2530.")

~~Mr. Minicus.~~ (Reading.)

"The Snyder patent relates to the use of ethylene glycol as a
softener or plasticizer for cellulosic films bearing a lacquer
6067 coating, preferably moistureproof. Ethylene glycol is used
partially or wholly displacing glycerol in a part of our moistureproof film, particularly where improved low temperature durability is desired. It is not used in non-moistureproof film because of its volatility and resultant evaporation from the film."

It is our contention, your Honor, that the next paragraph discloses the very close relationship between this licensing agreement and the moistureproof licensing agreement, and what is applicable to the moistureproof licensing agreement must perforce be applicable to this one.

I continue reading:

"Although the use is related and in practice limited to the manufacture of moistureproof film, it is not a component of the moistureproof coating and hence falls outside the main Du Pont-Sylvania moistureproof agreement. Sylvania is practicing the invention and desires a license. Since (1) the strength of the patent is not great, (2) the patent is closely related to the manufacture of moistureproof film and (3) a license is an added inducement to Sylvania to exchange licenses involving patents applicable to 'Cel-O-Seal' products, it was decided that the patent should be licensed to Sylvania at terms substantially those which would have applied had the patent been included in the main Sylvania agreement. It is understood between the parties that this action does not constitute a precedent."

6068 Also to be noted in the statements here concerned is not only does this license relate back to the moistureproof agreement, but it is also part of another deal whereby, as we shall see in a very short time, certain patents involving bands are being licensed back and forth.

I continue reading:

"In accordance with this decision the attached agreement provides for non-exclusive, non-assignable license to Sylvania under the Snyder patent at a royalty of 2% of the net selling price of the products manufactured and sold under the patent. It is agreed, however, that this royalty will be waived for all products on which a royalty is paid under the main agreement i. e., all moistureproof film sold by Sylvania domestically. The usual provision providing for patent marking, most favored licensee, etc. are included. The agreement was prepared by C. F. Daley of the Legal Department and bears Legal Department approval."

There is another instance in that paragraph where the royalties payable under the Snyder license are keyed to the royalties payable under the moistureproof license.

The Government offers in evidence Government Exhibit 2534 at page 3327. This is an agreement whereby the Snyder patent was licensed by Du Pont to Sylvania on May 20, 1942.

(The license agreement between E. I. du Pont de Nemours and Sylvania Industrial Corporation dated May 20, 1942, was received in evidence and marked, "Government Exhibit No. 2534.")

6069 Mr. Minicus. I will not read the agreement, but reference to Clause 2 (b) will show right within the agreement itself there is an implied incorporation of the terms of the agreement of April 26, 1933:

"It is agreed, however, that as to that quantity of products or articles manufactured and sold in accordance with the license granted in Article 1 for which Sylvania is already obligated to pay royalty to Du Pont under the agreement dated April 26, 1933, between Sylvania and the Du Pont Cellophane Co., Inc., the obligations and benefits of which agreement have been assumed by Du Pont and which agreement has been amended by date of April 12, 1938, Sylvania shall pay no royalty under this agreement, but royalty shall otherwise be payable in accordance with Paragraph (a) of this Article."

Now, the Government offers in evidence Government Exhibit 2535. This is at page 3332.

(The supplemental agreement between E. I. du Pont de Nemours & Company and Sylvania Industrial Corporation dated January 1, 1945, was received in evidence and marked, "Government Exhibit No. 2535.")

Mr. Minicus. Your Honor will recall at the close of the session last Friday we offered in evidence an exhibit dated January 1, 1945, the same date as this exhibit, whereby the agreement of April 26, 1933 as amended in 1938 was terminated and a new
6070 licensing agreement substituted in its place. This agreement, also of January 1, 1945, amends the Snyder license only, because the change in status is necessitated by the change in the situation under the moistureproof agreement of April 26, 1933. In other words, these two agreements, the license under the Snyder patent and the moistureproof agreement, so reciprocate each other that a change in one requires a change in the other.

I shall not read the changes made in the Snyder license except to draw your Honor's attention to Clause 2 (b) in the agreement wherein specific reference is made to the moistureproof agreement.

The Government offers in evidence Government Exhibit 2504 at page 3271, Government Exhibit 2505 at page 3272, Government Exhibit 2507 at page 3274, Government Exhibit 2531 at page 3321, Government Exhibit 2533 at page 3326; Government Exhibit 2537 at page 3335, and finally Government Exhibit 2305 at page 2658.

(The letter from R. E. DeRight to Mr. F. M. Prall dated April 3, 1942, was received in evidence and marked, "Government Exhibit No. 2504.")

(The letter from W. W. Smith to Dr. R. E. DeRight dated April 7, 1942, was received in evidence and marked, "Government Exhibit No. 2505.")

(The letter from R. E. DeRight to Mr. W. F. Raskob dated May 29, 1942, was received in evidence and marked, "Government Exhibit No. 2507.")

6071 (The report from Committee on Patents to Executive Committee dated April 6, 1942, was received in evidence and marked, "Government Exhibit No. 2531.")

(The letter from Charles F. Daley to Dr. Worth Wade dated May 8, 1942, was received in evidence and marked, "Government Exhibit No. 2533.")

(The letter from R. E. DeRight to Mr. C. F. Daley dated April 14, 1942, was received in evidence and marked, "Government Exhibit No. 2537.")

(The letter from Charles F. Daley to Dr. Worth Wade dated August 21, 1942, was received in evidence and marked, "Government Exhibit No. 2305.").

The COURT. Recess for ten minutes.

(At this point a brief recess was taken.)

6072 Mr. MINICUS. Now, to conclude our material on this license, the documents that have just been introduced into evidence portray every aspect in the interpretation and operations under this license to demonstrate its inter-relationship with the agreement of April 26, 1933. Specifically pointed out in these documents is the fact that the Snyder license was drafted to conform with the moistureproof agreement. That is shown by Government Exhibit 2504. Again, that the amount of royalties was keyed to and conditioned upon the moistureproof royalties. That appears in Government Exhibit 2507, also in the exhibit I read. Finally, that the Snyder license was reformed co-temporaneously with the moistureproof agreement on January 1, 1945, and that the terms of the new agreement are directly keyed to the moistureproof agreement again.

Now, beyond the relationship between the Snyder license and the moistureproof agreement there is shown in these documents, one of which I read, and others, the demonstration of the interdependence of all patent exchanges between Du Pont and Sylvania. Government Exhibit 2531 and Government Exhibit 2533, as well as the document read by myself, establish that the Snyder license was also part of another deal involving cross-licensing between Du Pont and Sylvania in the field of caps and bands. In a very short time we will consider that cross-licensing agreement, 6073 and when we come to it, I respectfully request the Court to bear in mind this relationship back again to this Snyder license.

I think that our purpose here this morning would be best used if we do show that all of these things are related one to the other. You can't pick out one licensing arrangement in this industry and say that that belongs there and another one belongs in here. They are all reciprocal. And if one is designed to exclude others from the industry, that exclusionary aspect must carry over and down through all of them.

Mr. GESELL. First I ask your Honor to note the date of this license, April 1, 1942. We have it in evidence that there was at that time a shortage of glycerine brought about by the war conditions. A reading of the Snyder patent, as Exhibit 2530 also indicates, shows it is a patent which Du Pont was using involving the use of ethylene glycol as a softener or as a plasticizer, partially or wholly displacing glycerine. Therefore the license pertained to a revision in the processes which were required due to material shortages.

The second think the document shows is that Slyvania was practicing the invention, no doubt because it couldn't get glycerine, and wanted a license. And what did Du Pont do? It licensed Sylvania non-exclusively for a royalty.

Now, sometimes we are accused of collaborating with Sylania to keep others out and sometimes we are accused of keeping
6074 Sylvania out, but I can't see the exclusionary effect of a one-way non-exclusive royalty license to a competitor to permit him to make a product which he would have difficulty making otherwise in times of shortage of raw materials brought about by a war emergency.

As far as the interdependence of this license to the moistureproof agreement is concerned, that also is a very simple and understandable fact. Ethylene glycol, the subject of this patent, could be used both in connection with moistureproof cellophane, as defined in the agreement, and otherwise. So naturally we had to recognize that unless some provision was made, there would be a cumulation of royalties in those cases where ethylene glycol was used for the manufacture of moistureproof cellophane. And we provided in the agreement that there should not be such cumulation of royalties on moistureproof film manufactured by Sylvania using ethylene glycol under the Snyder patent. We would be getting a royalty on that production in any event under that agreement. Considering the nature of the patent cumulative royalties were not asked. But I don't see why we should stand criticized for not asking for cumulative royalties.

Naturally since the patent read in part upon moistureproof production and in part didn't, it was necessary to recognize that the two agreements must coincide to some extent in the cases where they were both applicable.

At the opening of the presentation the suggestion was
6075 made that the failure to include this in the moistureproof agreement was difficult to understand, or unusual in some way. The documents make clear what the reason was. This did not involve moistureproof cellophane, the product, and it did not involve a component of the moistureproof coating specified in the agreement, and therefore, as document 2531 shows, as well as the initial document 2530 introducing this series, it was considered outside the agreement as in fact it was.

Mr. MINICUS. I would just like to take one moment, your Honor, to check the accuracy of one statement just made. The statement seemed to be that the Snyder patent related to moistureproof cellophane and something about "and otherwise", whatever the "otherwise" was.

Then a little later the statement was made that this patent read in part on moistureproof cellophane. Well, be that as it may, the first document I read was very specific, that this patent was only used in connection with moistureproof cellophane and nothing else. It says, in Government Exhibit 2530, "It is not used in non-transparent film because of its volatility and resultant evaporation from the film," and another statement in there specifically said that it is used with a lacquer coating.

So it is our belief, on the basis of those statements of the defendant corporation, that this was very closely related to 6076 the moistureproof situation and that whatever is ultimately found to apply to the moistureproof situation must apply to the Snyder patent as well.

6077 As to Mr. Gesell's statement that this product was the result or the use of this product was the result of war-time shortages as to that product I know nothing about that. I have never seen—I know there was a shortage of glycerin, but glycerin for a long time had not been used in moistureproof cellophane. The lacquer coating enables them to use other softeners, and it had been my understanding up until now that this softener of the Snyder patent was quite adaptable, quite a good softener for the use in moistureproof cellophane.

Now, the cross-licensing agreement that we are about to come to probably does concern a softener that was a war-time expedient. This involves a cross-licensing agreement between Du Pont and Sylvania executed in 1943 for exchanges of patent rights reading on softening agents. Here again the terms of this agreement do not expressly state any exclusionary features, certainly not to the extent that has been found in the earlier patent exchanges between these two exclusive manufacturers of cellophane. This is 1943. However, there is illustrated here by these documents the continued free and easy exchange of patent rights.

There were two licenses involved here. The first is a cross-license which granted both parties the right to operate under the other's patents, but Du Pont acquired rights only for use in conjunction with sheet material, cellophane film it was.

Even before acquiring these rights Sylvania possessed an implied license to so operate and actually received nothing 6078 in return for the rights given up under its patents. In other words, in this cross-licensing arrangement Sylvania gave up certain patent rights to Du Pont, in effect licensed them, and at the time it gave up rights it already had an implied license under the rights that it received back. Now, all of that related to film. Yet two months later Du Pont was able to acquire rights to operate under the Sylvania patent in the field of caps and bands merely for the asking and without the passage of any further consideration whatsoever.

The Government offers in evidence Government Exhibit 2050 at page 2120. This is a memorandum from the Rayon Department to the Committee on Patents dated March 29, 1943, heading "Patent Policy."

(The report from the Rayon Department to the Committee on Patents dated March 29, 1943, was received in evidence and marked, "Government Exhibit No. 2050.")

Mr. Minicus. (Reading.)

"It is recommended that approval be given to the execution on the part of the du Pont Company of the attached cross-license agreement already executed by the Sylvania Industrial Corporation and relating to the war films of the two companies.

"Du Pont needs a license under the Morgan Patent No. 2,288,413,"——

I might draw your Honor's attention to the fact that this is a
different Morgan patent, a different number than the one
6079 previously discussed.

I continue reading:

"* * * issued June 30, 1942, because its one claim dominates our use of ethanolamine sulfamate as a softening and flame-proofing agent in some of our war film in spite of the existence of our own two Cupery Patents Nos. 2,142,115 and 2,142,116, both issued January 3, 1939. De Pont also needs a license under the Morgan Patent to take care of our proposed immediate use of ethylamine hydrochloride as a softener in some of our films on account of its availability and its reasonably satisfactory quality and in view of our serious shortage of the conventional glycerin.

"We are, by this agreement, securing a royalty-free license under Morgan for all purposes for the duration of the war. We are giving to Sylvania in exchange a similar license under our two Cupery patents which they need to cover their use of ethanolamine sulfamate as a softening and flameproofing agent in some of their war films. It should be noted that they are purchasing this chemical from the Grasselli Chemicals Department and that this instrument merely substitutes a specific license for the implied license which has been running with that sale.

"The agreement also includes a license to us under whatever patent may issue from Cornwell application serial No. 442,202, filed May 8, 1942. Because this application has been under a Patent Office Secrecy Order we have not seen it but will receive

a copy as part of the agreement when such receipt is approved by the Committee on Patents. It is understood from 6080
conversations that the present application covers an improvement in the use of ethanolamine sulfamate in regenerated cellulose film and probably covers more specifically the film which is used for military capes.

"The licenses moving in the two directions are limited to regenerated cellulose film, and in the minds of the parties during the negotiation of this agreement, the word 'film' was used to mean only cellophane and not to include, for example, caps and bands which, by any ordinary interpretation, might be said to be included in the word 'film'. If we finally decide to use ethylamine hydrochloride as a softener for our bands and the Legal Department holds that the single claim of Morgan is infringed thereby, a separate negotiation will be undertaken with Sylvania for a license since it seems wise to let this agreement for cellophane proceed on its own basis, rather than seriously complicate this situation.

"It is believed that the disposition of part of the assets contained in the two Cupery Patents in return for the license under Morgan and Cornwell is well advised."

The next Government exhibit offered in evidence is 2044 at page 2113. This exhibit further describes the situation existing during the course of negotiations of this cross-licensing agreement. This is a letter from W. W. Smith to Canadian Industries Ltd. dated March 12, 1943.

6081 *Government's Exhibit 2044*

(The letter from W. W. Smith to Canadian Industries Ltd. dated March 12, 1943, was received in evidence and marked, "Government Exhibit No. 2044.")

Mr. Minicus. (Reading.)

"We have delayed somewhat our reply to your recent letter regarding the above-identified patent because it has been an active subject with us and we hoped to reply with as much current information as possible.

"You are correct in your assumption that no interference with any of our cases developed in the course of the prosecution of Morgan. We do not now have any cases by means of which an inference could be provoked although there are a couple of our patents which cause us to wonder how Morgan could have issued.

"After a study of the patents, our Legal Department has concluded that, although the Morgan patent does not appear to be clearly invalid, it appears to be weak in view of the history of its prosecution. Indeed, it may be invalid. Our Underwood U. S. patents Nos. 2,074,349 and 2,199,927 are particularly pertinent, as is also another Sylvania patent to Morgan, namely, U. S. patent No. 2,071,558. Since there is reason to believe that a later patent containing broad claims represents double patenting with respect to an earlier patent containing narrow claims where the earlier patent was filed at an earlier date and where the delay of the issuance of the later patent was due to the fault of the 6082 patentee, there is some reasonable basis for invalidating the second Morgan patent on this ground, in view of the earlier Morgan patent.

"Because of the exigencies of the war situation, we are considering the use of a glycerol substitute which apparently infringes this Morgan patent, U. S. patent No. 2,288,413. In order to expedite matters, we have arranged with Sylvania for an exchange of licenses under this patent and one of our patents for the duration. Although the license has not yet been executed, the parties have come to terms. We have adopted this procedure rather than an extended contest which would involve the validity of Morgan. There is considerable likelihood that when conditions again permit it, we shall resume the use of a softener which will not infringe Morgan.

"We do not happen to have any information which would indicate the probable existence of a corresponding Canadian application."

6083 The Government offers in evidence Government Exhibit 2051 at page 2122. I will not read this exhibit.

(Agreement between E. I. du Pont de Nemours & Company and Sylvania Industrial Corporation dated April 9, 1943, was received in evidence and marked "Government's Exhibit No. 2051.")

Mr. Minicus. This is the licensing agreement dated April 9, 1943, whereby the Sylvania patent to Morgan and the application of Cornwell was cross-licensed with the Du Pont-Cupery patents for film only.

The Government offers in evidence Government Exhibit 2061 at page 2140. This is a letter from Mr. Charles F. Daley to Dr. Worth Wade, of the Sylvania Corporation, dated May 5, 1943.

(Letter from Charles F. Daley to Dr. Worth Wade dated May 5, 1943, was received in evidence and marked "Government's Exhibit No. 2061.")

Mr. Minicus. (Reading.)

"You will recall that this patent is licensed to du Pont by the recent agreement dated April 9, 1943.

"In view of the present emergency situation we may possibly be interested in using in hollow pellicles, i. e., caps and bands, the material contemplated by the Morgan patent.

"Will your company be willing to extend du Pont's present license under the Morgan patent to the hollow pellicle field,

for the war period and six months thereafter, or three
6084 years, this being the period given in the agreement of
April 9, 1943?"

The Government offers in evidence Government Exhibit 2063 at page 2142. This is a letter from F. M. Prall to L. A. Yerkes dated June 7, 1943, subject "Modification of License to Du Pont from Sylvania under Morgan Patent No. 2,288,413."

(Letter from F. M. Prall to L. A. Yerkes dated June 7, 1943, was received in evidence and marked "Government's Exhibit No. 2063.")

Mr. MINICUS. (Reading).

"You will recall as of April 9, 1943, an agreement was executed between ourselves and Sylvania whereby they secured a license under Cupery so that they could use this flameproofing composition for the duration of the war. In return, we secured a license under the Morgan patent, for film because it had claims which dominated Cupery.

"I have always felt that Sylvania considered this exchange merely straightened out the use of flameproofing compositions. Actually, we needed a license under Morgan to permit the use of ethylamine hydrochloride as a general softener. I considered that we might well have to pay royalties because, after all, Sylvania had an implied license under Cupery with each pound of flameproofing material they purchased from Grasselli with the result
that we were really not giving them anything important. I
6085 was very much surprised and pleased that we got access to
ethylamine hydrochloride for film at no royalty.

"We knew at the time that we needed a further license under this patent for this material for caps and bands. We thought if we joined caps and bands with film, we ran a real risk of paying royalty for film as well as for caps and bands. We therefore separated the two problems. The first agreement having been signed, we started a second and we fully expected to pay royalties for caps and bands. I am again surprised and pleased to find that we secured what we needed at no royalty.

"I am not quite clear as to whether Sylvania did not fully understand the import of their license or whether, on the other hand, they are generous and are building good will. In any case, I think we should recall this situation in future dealings with Sylvania.

"I believe the agreement is entirely satisfactory for execution and since there is no disposition of company assets, I would consider that you could execute for the Company."

Then Government Exhibit 2052 at page 2125 is offered in evidence but will not be read.

(Agreement between E. I. du Pont de Nemours & Company and Sylvania Industrial Corporation dated June 14, 1943, was received in evidence and marked "Government's Exhibit No. 2052.")

Mr. MINICUS. This is simply an extension of the license duPont secured under the cross-licensing agreement from
6086 Sylvania with reference to the Morgan patent and permit
them to operate now in the field of caps and bands.

This series has been introduced to attempt to make as complete as possible a showing of the licensing and cross-licensing arrangements between these two companies. The Government is not attempting to show here that there are any exclusionary terms in this particular license. It is a late license, 1943, and our only purpose is to show that as of that time this perfectly free interchange of rights under patents between these two manufacturers was continuing and in some cases even without any showing of consideration whatsoever.

Mr. GESELL. Your Honor, before I come to this I want to get straight about this ultra-violet light situation. I find that the waves that cause sunburn are different lengths and of different character than those that cause rancidity, so that your Honor could get a sunburn even though you wouldn't become rancid.

The COURT. How would it be to stop my earns from burning throughout the trial?

Mr. GESELL. If I may, I would like to hand up what this is all about, this situation. What I have handed your Honor there is one of the cellophane military capes which were made by duPont and by Sylvania during the war under these patents that are involved. I think all men overseas in the Army had two or
6087 three of those issued to them. Their purpose was to protect
against mustard gas blisters primarily. Here was an agreement between duPont and Sylvania under which each of them gave the other non-exclusively royalty-free licenses under patents that covered this flameproofing agent and that read on these military capes. They did that during the war for the duration of the war.

The COURT. Supplying a military need?

Mr. GESELL. Supplying a military need.

The COURT. They weren't sold commercially?

Mr. GESELL. No, your Honor.

Then when the question of caps came up, which your Honor will recall were used in the manufacture of airplanes to cap off various open tubing to prevent particles from getting into the tubes or any other opportunity of sabotage, the license was extended to cover that. And I for the life of me cannot see why such a license was injurious to the public interest or had any exclusionary effect. And in the urgencies of the moment it seems to me that duPont

can be excused from saying that it wants a license from Sylvania rather than going through the process of deciding whether it is going to infringe the patent and how strong the patent is and what damage it is going to incur either for it or for the Government with which it is contracting if it doesn't get the license, and I do think it is a bit far-fetched to argue that because Sylvania licensed these patents royalty-free to us it was doing some-
6088 thing conspiratorial and covert, rather than that the obvious pertinence of those things to the urgency of that day was apparent.

Then it isn't quite correct to suggest that when we license back Sylvania didn't get anything because while it is true they had an implied license when they bought some of these chemicals from us, after they got a license under the patents they didn't have to buy them from us any longer; they could have bought them from anyone.

So that also had a liberalizing effect, a non-exclusive cross-license, royalty-free for the duration of the war in the interests of the war effort, which expired by its terms in 1946.

Mr. Minicus. There is one other statement that has been made that is not correct. In response to your Honor's question, Mr. Gesell has stated that these things were used in those gas capes, that the flameproofing purpose was the purpose, duPont had no other reason, and they were not used for any other purpose. I will again have to draw attention to Government Exhibit 2063 at page 2142, which I previously read and I am surprised it was not clear. The second paragraph reads, "I have always felt that Sylvania considered this exchange merely straightened out the use of flameproofing compositions. Actually, we needed a license under Morgan to permit the use of ethylamine hydrochloride as a general softener." In other words, it covered the same field as the
6089 Snyder patent, a general softener.

Now, the Government's trial brief, if your Honor is following this in the index—all of this material this morning presented is in the index at III 2 and III 3. In the trial brief the entire material is encompassed by paragraphs 122 to 139. Again the Government's trial brief at paragraph 129 states the following contention:

"The 'community of interests' based upon patents which controlled the technology of this industry was extended to cellulose bands and expanded to include Celon. Defendant, together with Celon and Sylvania, formed a combination of owners of virtually all United States Letters Patent relating to cellulose bands, which was motivated to preclude access to these patents by strangers to the cobination who might otherwise constitute potential competition."

* * * * * *

6092 About two weeks ago there was an indication that the decree was about ready to be tendered. Your Honor asked for it at the opening.

The COURT. You mean as to the special phase of the case as it relates to patents?

Mr. GESELL. Yes, or preferably as to the case as a whole. I would like to know where we are headed in the hope that it may help focus our issue as we come toward the end of this case, and I was wondering whether we were going to get some sort of a document from the Government at some stage.

Mr. MINICUS. Is Mr. Gesell asking for the submission of a form of decree at this stage?

The COURT. He says he does not ask you to submit him a form of decree but he would like specificity as to your prayers for relief because the complaint contains general allegations for relief.

Mr. MINICUS. I quite understand that, your Honor, and we would like to submit something on it if I may have just a little more time. I think shortly after the conclusion of our patent section I will be able to supply it.

Mr. GESELL. That is quite all right. I just hoped we would get it before their case ended, your Honor.

The COURT. Fine.

Adjourn Court until tomorrow morning at 10:30.

(At this point the trial was adjourned to Wednesday, May 2, 1951, at 10:30 o'clock a. m., Eastern Daylight Saving Time.)

* * * * * * *

6174 2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. FITZPATRICK. Your Honor, we come now to the next and last group of patents and illegal restrictive practices of defendant duPont in connection therewith. The Government is now at paragraph 157 of the trial brief, III 2 (b) of the index.

Around 1931 two important methods of contriving to make moistureproof cellophane adhere to itself appeared in the field. Once again these patents were developed by research activity outside the fold of defendant duPont's vast technological machine, and once again duPont deigned to bring them rapidly within its own orbit of control. These patents involved heat sealing and solvent of moistureproof cellophane. The utility of 6175 this characteristic for packaging is very obvious, especially in the tobacco industry.

The Government now offers into evidence Government Exhibit 2172 at page 2395 which rather vividly portrays the birth of the over-all situation herein involved.

That was suggested to be a tie-in matter. But, your Honor, I think that suggestion ignores the date of the letter. The letter is dated April 13, 1932, at which time Du Pont and Sylvania were embroiled, as we have seen, in a bitter patent controversy brought about by Sylvania's blatant infringement of the moistureproof patent. And this is not concerned with the tie-in problem but is concerned with our not wanting to sell cellophane in any way which would impliedly recognize Sylvania's right to manufacture moistureproof cellophane at all. And with the concession of the Government which they are forced to make that the labeling itself is not illegal, there certainly is no tie-in situation presented in our view of these documents at all. And to argue that this simple situation brought about to free Du Pont's customers to seal cellophane was a method of expanding Du Pont's moistureproof monopoly at a time when it had a basic product patent and was the only lawful manufacturer of the product in the United States I think is a suggestion that goes too far. We merely obtained for our customers the right to seal cellophane whatever their business was.

There is one other matter on this that I overlooked. There is a series of documents here, your Honor, 2183 and 2185, which were not read in full to the Court and as to which your Honor will recall I protested some at the time. These documents 6206 disclose—and they may be of some pertinence in the case—that in 1933 the Federal Trade Commission not only called both on Humitube and Dobeckmun Company and inquired into their arrangements with Du Pont, but they went on to Du Pont and made a detailed inquiry, not only into the Vis-O-Tube situation but into the arrangements between Du Pont and Sylvania under the basic moistureproof patents, and I think it is of some interest that no action was taken by the Federal Trade Commission after an examination into these agreements which the Government now attacks.

If we have completed the patent section of the case—Have we?

Mr. Minicus. We have just about completed the patent section.

Mr. Gesell. Just about?

Mr. Minicus. Yes.

Mr. Gesell. Well, I will wait until you have completed it.

Mr. Minicus. I am about to introduce a new section. I have a couple of comments to make before I do, and if you have anything else to say——

Mr. Gesell. If you are leaving this section I think, your Honor, it might be well if I sought in a brief way to pull together what I understand the situation is on the basis of this patent proof. It

Government's Exhibit 2172

(Memorandum from T. L. Hines to The Executive Committee, Du Pont Cellophane Company, Inc., dated June 9, 1931, was received in evidence and marked "Government's Exhibit No. 2172.")

Mr. FITZPATRICK. This is a letter from T. L. Hines, Assistant General Manager of the Du Pont Cellophane Company, Inc. to the Executive Committee dated June 9, 1931.

"Moistureproof Cellophane Sealing.

"A patent for heat sealing of Moistureproof Cellophane has issued to the Dobeckmun Company. A patent for solvent sealing of Moistureproof Cellophane has issued to the Humitube Company and they have pending an application for heat sealing. Dr. Taylor of the Atlantic Coast Fisheries has pending an application for solvent sealing, utilizing methyl cellosolve.

"Humitube is provoking an interference between their pending application and the issued patent of Dobeckmun. Taylor will probably provoke an interference with the issued patent of Humitube.

"Regardless of how these interferences terminate, some one will have claims covering heat sealing and covering solvent sealing and our customers such as the Reynolds Tobacco Co. 6176 are and will be infringing and we, ourselves, will be contributory infringers.

"We believe the heat sealing patent, whether it finally goes to Humitube or Dobeckmun, is invalid in view of prior public use. We believe the solvent sealing patent to Humitube is invalid because of its breadth and an earlier pending application of our own. We believe that the Taylor patent, should it issue, and be limited to solvents alone, will be valid. It can only issue should an interference with Humitube prove that Taylor had an earlier invention date. This appears unlikely because we know that Taylor intends to negotiate with Humitube for an exclusive license for solvent sealing for foodstuffs. Humitube may also offer the Reynolds Tobacco Co., an exclusive license to cover the sealing of Moistureproof Cellophane for cigarettes.

"It is now our opinion that the Humitube and Dobeckmun patents can be acquired for reasonable sums and Mr. Pritchard has recommended that we try to secure these patents rather than contest them.

"It is therefore recommended, after a consultation as of this date between Messrs. B. M. May, W. S. Pritchard, Levin, Pralatowski, and the writer that Mr. Pritchard be authorized to expend not in excess of $40,000 to acquire the above-mentioned Humitube and Dobeckmun patents with the expectation that the actual ex-would take me probably about ten minutes.

6207 The Court. Let me see if I am following counsel. As I understand it then, the Government—we will make reference to its index—has completed III Section 2 (a) and (b)?

Mr. Fitzpatrick. That is correct, your Honor.

The Court. And you will now direct your comments to those sections?

Mr. Gesell. To the entire patent section.

The Court. I don't know what the entire patent section is.

Mr. Gesell. III.

The Court. All of it? Haven't you made comment on it?

Mr. Gesell. I have, your Honor. What I would like to do is simply to take the net of all this proof and relate it to the date of the complaint.

The Court. Well, why do you not postpone that until he finishes the section?

Mr. Gesell. I thought he had, your Honor.

Mr. Minicus. I have, for all intents and purposes, finished it. I am about to introduce the next section. I want to make a few comments on Mr. Gesell's statements now, but from there we will go into the next section.

The Court. What will be the next section?

Mr. Minicus. Section 4, under the heading or specification of exclusion and suppression. We are going to postpone

6208 our argument on the total patent section until the close of the case, your Honor, and make it in closing argument.

The Court. Let me see if I understand the order of discussion. If you go forward now with your comments, Mr. Minicus, and Mr. Gesell follows you, then are you going to re-discuss what he has had to say?

Mr. Minicus. No, sir, we are not going to argue any further on the patent section. We feel it has been argued completely.

The Court. Suppose you make whatever comments you want to make and then you complete your discussion, Mr. Gesell, and that will end that section.

Mr. Minicus. Thank you, sir.

With specific direction to Mr. Gesell's comments and in particular to this matter of the Federal Trade Commission, I would like to point out that Mr. Gesell repeatedly said "they". There was no "they" in this matter at all.

The Court. Certainly the representative was not an interloper, was he?

Mr. Minicus. He didn't represent the Commission in the sense of the term "they" as meant to apply to the Commission.

The Court. You certainly represent the Department of Justice, don't you. Why would his role be different from yours?

penditure will be considerably less."

6177 So here again, your Honor, we have the first step in the plan. Du Pont believes that the patents are invalid, and yet its very next step is to make arrangements for their acquisition. The answer is an obvious one, the reason for their desiring to acquire these patents, that is, because valid or invalid in the hands of defendant duPont these instruments will serve as one more small but potent offensive weapon in the control of their cellophane market.

6178 The Government now offers in evidence Government Exhibit 2831 at page 6101. This is a letter from the Secretary of the Executive Committee, F. G. Hess, to T. L. Hines, Assistant General Manager, Cellophane Department, dated June 11, 1931.

Government's Exhibit 2881

(The letter from F. G. Hess to T. L. Hines dated June 11, 1931 was received in evidence and marked, "Government Exhibit No. 2831.")

Mr. Fitzpatrick. (Reading.) "Action Taken by Executive Committee at Meeting June 10, 1931.

"Remarks—Referring to your letter of June 9th (#983), reviewing the situation regarding a patent owned by the Dobeckmun Company covering heat sealing of Moisture-Proof Cellophane, a patent owned by the Humitube Company covering solvent sealing of Moisture-Proof Cellophane, a pending application for patent of the Humitube Company for heat sealing, and a pending application for patent of Dr. Taylor of the Atlantic Coast Fisheries covering solvent sealing. Recommendation was made by you, after consultation with Vice-President B. M. May, Mr. Pralatowski, W. S. Pritchard, Patent Counsel, and his Assistant H. H. Levin, that authorization be granted to spend not in excess of $40,000 in the acquisition of the above mentioned Dobeckmun and Humitube patents, with the expectation that the actual expenditure will be considerably less than amount stated.

"After discussion with you, it was moved and unanimously carried that recommendation as noted above be approved.

6179 Inasmuch as the existence of these two patents, covering as they do principles of sealing so generally used in connection with automatic wrapping machinery, constitutes a source of continual nuisance and irritation to our customers, and the further possibility that they may retard the use of Cellophane * * *" and here again, your Honor, we see the dual purpose of acquisition—protection of the customers and also guard the orderly distribution of cellophane—"* * * it appears important that this Company acquire these patents so as to be in position to grant licenses thereunder and to remove the potential annoyance to our customer.

"The Committee also would like to be informed if and when the above mentioned application of Dr. Taylor of the Atlantic Coast Fisheries covering solvent sealing issues in the form of a patent."

Pursuant to this approval of the Executive Committee agreements were executed and the Government now offers in evidence Government Exhibit 2178 at page 2422. This is a letter from F. G. Hess, Secretary of the Executive Committee to J. E. Hatt, General Manager, Cellophane Department, dated December 4, 1931.

(The letter from F. G. Hess to J. E. Hatt dated December 4, 1931, was received in evidence and marked, "Government Exhibit No. 2178.")

Mr. **Fitzpatrick**: This letter briefly describes these agreements, and I will read it:

6180 "Subject—Acquisition of Patent Rights Covering Sealing of Moistureproof Cellophane from The Dobeckmun Company and The Humitube Manufacturing Company—Licenses to These Companies: Action Taken by Executive Committee, At Meeting December 2, 1931.

"Remarks—Vice-President B. M. May stated that, pursuant to authority granted by this Committee at meeting held on June 10, 1931 to spend not in excess of $40,000.00 in the acquisition of certain patent rights owned by The Dobeckmun Company and the Humitube Manufacturing Company covering sealing of Moistureproof Cellophane, proper officers of the Company executed, under date of November 12, 1931, agreements with these two companies as presented by Wm. S. Pritchard, Patent Counsel, and bearing your approval. These agreements replaced those executed by us under date of September 25, 1931, as indicated in our advice of action dated September 30, 1931, and provide as follows:

"Agreement with The Dobeckmun Company:

"1. Assignment by The Dobeckmun Company to the Du Pont Cellophane Company, Inc. of the following U. S. Letters Patent, subject to a non-exclusive license granted to Arthur Colton Company of Detroit, Michigan, on June 26, 1931, and the inventions disclosed in the following U. S. Patent Applications * * *."

I will not read the application numbers and patent numbers which are listed below.

(Reading.) "* * * together with all improvements thereon, which Dobeckmun may hereafter acquire and have the right to assign, and any and all foreign patents which have issued for the inventions disclosed in said Letters Patent or applications for Letters Patent, and any and all applications 6181 for foreign patents, together with any foreign patents which may issue thereon."

Here we have the future patent rights provision.

"2. Payment of $35,000.00 by Du Pont to Dobeckmun.

"3. Du Pont agrees to grant to Dobeckmun a non-exclusive license to make, use and sell the inventions disclosed in U. S. Letters Patent Nos. 1,756,919 and 1,780,142, and application for U. S. Letters Patent Serial No. 406,410 listed above, to the full end of the respective terms for which said Letters Patent have been granted or for which Letters Patent may be granted on said application, together with any improvements thereon, which Du Pont may acquire and which it has the right to license.

"4. Du Pont agrees to grant to Dobeckmun a non-exclusive, non-transferable license under U. S. Letters Patent No. 1,792,388, issued February 10, 1931, and applications for U. S. Letters Patent Serial Nos. 470,483, filed July 24, 1930, and 513,045, filed February 2, 1931, as soon as it receives title (from Humitube Manufacturing Company) to said Letters Patent and applications, subject to the following conditions:

"(a) The license is to be non-exclusive and non-transferable;

"(b) Du Pont shall have the right to cancel said license on 90 days notice in writing to Dobeckmun; 6182

"(c) The license terminates without notice to Dobeckmun upon the bankruptcy or insolvency of Dobeckmun.

"Agreement with the Humitube Manufacturing Company:

"1. Assignment by Humitube Manufacturing Company to Du Pont Cellophane Company, Inc. of U. S. Letters Patent No. 1,792,388, issued February 10, 1931, subject to a license heretofore granted to Package Machinery Corporation, and the inventions disclosed in the U. S. Patent applications Serial Nos. 470,483, filed July 24, 1930, and 513,045, filed February 2, 1931, together with all improvements thereon which Humitube may hereafter acquire and have the right to assign, and any and all foreign patents which have been issued for the inventions disclosed in said Letters Patent or applications for Letters Patent, and any and all applications for foreign patents, together with any foreign patents which may issue thereon.

"2. Du Pont agrees to grant to Humitube a non-exclusive license to make, use and sell the inventions disclosed in U. S. Letters Patent No. 1,792,388, and applications for U. S. Letters Patent Serial Nos. 470,483 and 513,045 above listed, to the full end of the respective terms for which said Letters Patent have been granted, or for which Letters Patents may be granted on said applications, together with any improvements thereon, which Du Pont may acquire and which it has the right to license.

6183 "3. Du Pont agrees to grant unto Humitube a non-exclusive, non-transferable license under U. S. Patents Nos. 1,756,919, issued April 29, 1930, and 1,780,142, issued October 28, 1930, as soon as it receives title (from The Dobeckmun Company) to said Letters Patent, subject to the following conditions:"

Then the conditions are there the same as we have seen that were imposed on the Dobeckmun Company in Section 4 of the first part of the letter.

6184 "Mr. May further reported that the agreements above referred to have been executed by the Dobeckmun Company, and the Humitube Mfg. Co., and also that assignments to us of patents and applications for patents mentioned in these agreements have been received and are being recorded in the United States Patent Office in Washington. Also, as called for in the agreements, Mr. May stated that licenses to the Dobeckmun Company, and the Humitube Mfg. Co., were executed by the proper officers of our Company under date of November 30, 1931, and that the Treasurer had been authorized to issue check for $35,000.00 to the order of The Dobeckmun Company, representing consideration stipulated in the agreement with them.

"After discussion, it was moved and unanimously carried that actions of the proper officers of the Company in executing agreements, and licenses, and arranging for payment as above mentioned be approved, ratified and confirmed."

Thus we see, your Honor, by this series of transactions Du Pont is ready once more to step to the helm of another illegal patent combination.

The Government now offers in evidence Government Exhibit 2173 at page 2397 and Government Exhibit 2174 at page 2403.

(Agreement between Du Pont Cellophane Company, Inc. and Humitube Manufacturing Co. was received in evidence and marked "Government's Exhibit No. 2173.")

6185 (Agreement between Du Pont Cellophane Company, Inc. and Dobeckmun Company was received in evidence and marked "Government's Exhibit No. 2174.")

Mr. Fitzpatrick. These are the master Humitube and Dobeckmun agreements respectively, of November 12, 1931, which were discussed in the letter just read.

Reading now from the second paragraph of page 2399 in Government Exhibit 2173, the Du Pont-Humitube master agreement, we note a rather interesting limitation imposed upon the patent holder to be, Du Pont. Starting the second paragraph thereof:

"Du Pont agrees to grant to Humitube and to only one other at the same time a license on terms not more favorable than that granted to Humitube under said patents and applications for the manufacture for resale of pouches made of moistureproof Cellophane of the following dimensions: "The agreement then sets out specific dimensions of this type of tobacco pouch.

Your Honor will observe that the Du Pont-Dobeckmun agreement, Government Exhibit 2174, which has just been entered into evidence, on the last paragraph of page 2405 imposes a similar restriction upon Du Pont.

At this point, your Honor, I would respectfully call your attention to the fact that these master agreements are not patent license agreements. They obviously can't be patent license agreements because Du Pont does not yet own the patents. They are rather merely bilateral contracts consisting of Du Pont's
6186 promise to license in return for Dobeckmun and Humitube's promises to assign. The significance of this will become apparent as we go on.

The Government now offers in evidence Government Exhibit 2175 at page 2410.

(United States Patent Office record of assignment dated November 25, 1931, from Humitube to Du Pont, was received in evidence and marked "Government's Exhibit No. 2175.")

Mr. Fitzpatrick. This is the United States Patent Office record of the assignment dated November 25, 1931, from Humitube to Du Pont of the patent and patent applications discussed in the foregoing agreement and recorded in the Patent Office December 1, 1931, and by referring now to Government Exhibit 2001 at page 35, already in evidence, we see that patent Nos. 1,756,919 and 1,780,142 were assigned to Du Pont by the Dobeckmun Company on November 16, 1931.

The Government offers in evidence Government Exhibit 2176 at page 2414 and Government Exhibit 2177 at page 2418.

(License agreement between Du Pont Cellophane Company, Inc. and Humitube Manufacturing Co. was received in evidence and marked "Government's Exhibit No. 2176.")

(License agreement between Du Pont Cellophane Company, Inc. and the Dobeckmun Company was received in evidence and marked "Government's Exhibit No. 2177.")

Mr. Fitzpatrick. These are respectively the license
6187 to Humitube and the license to Dobeckmun, both signed by Du Pont on November 30, 1931, pursuant to the master agreements discussed previously.

It is very important here to note, your Honor, that these license agreements which I will not read are on their face merely non-exclusive licenses under the sealing patents and nowhere in these licenses does Du Pont place any limitation upon itself as to how many other licenses it may grant under these patents to tobacco pouch manufacturers.

The Government now offers in evidence Government Exhibit 2180 at page 2428.

(Memorandum from J. E. Hatt to Executive Committee dated April 13, 1932, was received in evidence and marked "Government's Exhibit No. 2180.")

Mr. Fitzpatrick. This is a letter to the Executive Committee from J. E. Hatt, General Manager of the Cellophane Department. This letter clearly explains the intended effect of the aforementioned agreements and the use to which defendant duPont intends to put the patents acquired thereby. The letter is dated April 13, 1932, and reads:

"Method of Licensing Users of Moistureproof Cellophane under the Dobeckmun & Humitube Patents Recently Acquired.

"The recently acquired Dobeckmun and Humitube patents provide for the heat sealing of Moistureproof Cellophane under certain restricted conditions, and also for the use of a solvent 6188 in sealing the material with heat.

"Rather than attempt to provide all machine users and customers, as well as package machinery manufacturers with the necessary licenses under these patents, it has been recommended by Mr. W. S. Pritchard that we apply a license label to our various packages of Moistureproof Cellophane as shipped to the respective customers—such license giving them the right to use our product so shipped bearing this license under these patents, if they desire.

"The implied suggestion to them is also that they will have no license to so handle other so-called Moistureproof material, and we will not have weakened our patent position in this respect by knowingly permitting violation on the part of some of our trade, using some of their wrapping materials in the form of competitive products.

"I have reviewed this matter with Mr. Haskell of our Legal Department and he thinks the label license suggestion is entirely in order."

This document then, your Honor, goes on and points out clearly the obvious intent of Du Pont here to restrain trade in the manufacture of tobacco pouches, and I read:

"Under our contract with Dobeckmun and Humitube, * * *" if I may call your Honor's attention to this point, the language is "Under our contract with Dobeckmun and Humitube" not "Under our license agreements with Dobeckmun and Humitube"— 6189 "* * * we restrict to them the right to make tubes or pouches having plicated sides with the ends folded on the body to form an end seal, in the dimensions from the smallest width possible, up to a maximum width of 2¼" and in the range of lengths between 5" and 8" in overall length. The point in doing this was to restrict the manufacture of tubes in this fashion to these two concerns so as to make it possible to have a definite interest behind the sale of this material.

"This is included as explanatory to the Committee, of the restriction in the subject matter of the license proposed.

"Mr. Pritchard's suggestion of the phraseology for this license label is as follows:

'The purchaser of this package is licensed to use the material contained herein under patents Nos. 1,756,919; 1,780,142 and 1,792,388 except for the manufacture of pouches having plicated sides' * * *" of the dimensions which we have read from the letter.

"We believe it desirable to approach this subject in this fashion and recommend the Committee's approval of this procedure."

The COURT. Tell me, is there anything illegal about the affixation of a license label upon a product?

Mr. FITZPATRICK. No, not directly, your Honor, except again you are attempting to point out that Du Pont is holding patents under sealing processes which they do not intend to use
6190 directly themselves. They are not going to collect any royalties from these patents, and they are going to license only their own customers of cellophane to use these patents. In other words, they are going to by this means tie in patented moistureproof cellophane to the patents in question, and the license also has the other purpose of setting up this nice little corner of the industry for Dobeckmun and Humitube in the tobacco pouch manufacture, and Du Pont has thus secured to its own customers a very lucrative portion of the business.

6191 The COURT. Will the evidence disclose, if it has not already, the percentage in terms of production that this particular material has with relation to Du Pont's total output?

Mr. FITZPATRICK. Well, the evidence that the Government has will not, your Honor, except that it refers to the fact that these licenses are desired by the Reynolds Tobacco Manufacturing Company, and I would presume that their percentage of the business is quite high.

The Government now offers in evidence Government Exhibit 2181 at page 2430. This is a statement from the Executive Committee approving the suggestion of J. E. Hatt as set forth in Government Exhibit 2810 just read.

(The statement of the Executive Committee dated April 20, 1932, was received in evidence and marked, "Government Exhibit No. 2181.")

Mr. FITZPATRICK. Thus, your Honor, as we have just tried to discuss, we see that the license label applied to the packages of moistureproof cellophane sold by the defendant Du Pont was meant to perform a dual purpose. First, in the future only purchasers of Du Pont moistureproof were to receive a license under the sealing patents, and these licenses are to be limited only to those products which they make out of the moistureproof cellophane so purchased. Thus once again an illegal tie-in is manifest. Du Pont charges no royalties for these licenses. Du Pont is not in the sealing business and thus derives no profit 6192 directly from the exploitation of these patents. Rather Du Pont is in the business of selling moistureproof cellophane, and here it is obviously attempting by exploitation of the sealing patents to acquire for itself a limited monopoly for its moistureproof. In other words, Du Pont is using one patent to expand the monopoly of another patent, and we submit that such a practice is nowhere to be found within the valid patent grant. Thus once more this section of the market was closed.

Secondly, the reservation in the license label pertaining to tobacco pouches which resulted as an obvious outgrowth of the Humitube and Dobeckmun master contract agreements—not the license agreements, but the contract agreements wherein Du Pont had limited itself to those two licensees in this particular field—constitutes illegal restraint of trade not valid by virtue of any patent rights.

In other words, Du Pont was in effect here a patent holding company, and its purposes as per the master agreements were to keep the markets limited and hence profitable to its licensees who, of course, were exclusively purchasers of Du Pont moistureproof.

That this illegal restraint was apparent and was felt by other members of the industry, the following documents will point out.

The Government now offers in evidence Government Exhibit 2183 at page 2435. This is a letter from J. E. Hatt, 6193 General Manager, to Mr. L. A. Yerkes dated May 15, 1933.

(The letter from J. E. Hatt to Mr. L. A. Yerkes dated May 15, 1933, was received in evidence and marked, "Government Exhibit No. 2183.")

Mr. Fitzpatrick. (Reading.) Arrangements for Tube Manufacture with Humitube and Dobeckmun Companies.

"You will recall the arrangements made a year or so ago whereby we took over patents from the Dobeckmun Company and the Humitube Company, under an arrangement whereby each of them was given a license under the Dobeckmun patents for the manufacture of cigar tubes from Moisture Cellophane, and under the patent taken over from Humitube covering the solvent sealing of Moistureproof Cellophane.

"A part of our consideration in payment of these patents to these concerns was our agreeing to give them each a non-exclusive license under those patents for their own use but agreeing also that no further licenses under these patents would be granted except to the Humitube Company and to the Dobeckmun Company.

"Sometime ago, we had a request from a concern in Chicago to sell them Cellophane for the manufacture of cigar tubes which manufacture would infringe these patents.

"At that time, the matter was thoroughly discussed with Mr. W. S. Pritchard and Judge W. S. Gregg of the Legal Department
in Wilmington, and they advised us that under our ar-
6194 rangements with the Humitube and Dobeckmun Companies,
we could not license a third converter and that we were obligated to protect these patents against infringement by others."

Again I call to your Honor's attention that that was a contract arrangement, not a license arrangement.

The note on the bottom of the page reads:

"The Saniwrap Company who threatened action under Clayton Act despite which our lawyers advised not granting license." Signed J. E. Hatt.

Continuing on the last paragraph of the next page:

"The entire situation so——

Mr. GESELL. Oh, now, wait a minute.

Mr. FITZPATRICK. Continuing on the last paragraph of the next page——

Mr. GESELL. You are not going to read to the Court that the Federal Trade Commission investigated the matter and said we were all right?

Mr. FITZPATRICK. Yes, Mr. Gesell. I was planning to read it in the next document, if you will permit me.

"The entire situation so far as we can determine, appears to be entirely legal and in good order and this is supplied purely as a matter of information."

The Government offers in evidence Government Exhibit 2185 at page 2438, a letter from J. E. Hatt, General Manager, to Mr. F. G. Hess dated December 12, 1933.

6195 (The letter from J. E. Hatt to F. G. Hess dated December 12, 1933, was received in evidence and marked, "Government Exhibit No. 2185.")

Mr. FITZPATRICK. (Reading.) "Suit Against Vis-O-Tube Company, Chicago, for Infringement of Humitube and Dobeckmun Patents.

"In conection with this suit, I think the following information may be of interest for our permanent record and this memorandum is to give you certain facts of recent occurrence just to complete your file in connection with this.

"Several days ago, we had a call from Mr. James J. Laughlin an attorney for the Federal Trade Commission, Washington, D. C.

"It seems a complaint had been filed by the Sani-Wrap Company of 2714 Cottage Road, Chicago, which is headed by one Leonard Wecklers, and who is a small producer of tubes for cigars. At one time, he bought some material from us but on account of the arrangements under which we were able to secure the Dobeckmun-Humitube patents, it was not possible, under that agreement, to license him and we were forbidden to sell Moistureproof Cellophane for the manufacture of these cigar tubes to others than the two licensees under that agreement by which we secured these patents."

Continuing again on the next to the last paragraph of the next page:

6196 "After the accumulation of all the evidence available on this subject in Chicago, the attorney"—and this is the Federal Trade Examiner—"informed me that from his point of view, there appeared to be no grounds for a valid complaint here and he was writing a report accordingly to the Commission. He also informed us if there were anything in subsequent proceedings that were not in accordance with what is indicated herein, he would see we were duly informed."

Thus the matter, your Honor, was dropped after the expression of an opinion by a mere Federal Trade Commission Examiner, a field examiner who had obviously no authority to make such a statement.

Now, if there is still any doubt at this point as to whether or not this agreement between Dobeckmun, Humitube, and Du Pont was meant to be a restraint of trade, we have one more and final requisite, a harassing infringement suit by Du Pont to protect its own moistureproof customers.

The Government now offers Government Exhibit 2186 at page 2440. This is a letter from J. E. Hatt, General Manager, to Mr. F. G. Hess dated August 3, 1933.

Government's Exhibit 2186

(The letter from J. E. Hatt to F. G. Hess dated August 3, 1933, was received in evidence and marked "Government's Exhibit No. 2186.")

Mr. Fitzpatrick. (Reading) "Infringement Suit Against Vis-O-Tube, Chicago, under Dobeckmun & Humitube Patents for Cigar Tube Manufacture. 6197

"For the information of the Executives, this suit, which we are obliged to carry on, on account of our contract arrangements with Humitube and Dobeckmun for the acquisition of their patents, is like some others being defended by Sylvania's attorneys.

"Perhaps with some kind of disposition of the trade mark suit now pending, it may be desirable to discuss with them this whole question of their opposition to our various activities.

"This is simply for the information of the Executives."

I would like to point out in this letter that we see once more, your Honor, that here Du Pont is suing "because of our contract arrangements"; so once again not to protect its patents, not to protect its patent licenses, but to protect an illegal restraint of trade agreement between Dobeckmun, Humitube, and itself. That is the reason for the suit.

The Government now offers in evidence Government Exhibit 2187 at page 2441, a letter from Mr. J. E. Hatt to Mr. F. M. Pralatowski dated September 25, 1935.

(The letter from J. E. Hatt to F. M. Pralatowski dated September 25, 1935, was received in evidence and marked, "Government Exhibit No. 2187.")

Mr. Fitzpatrick. The heading is "Vis-O-Tube Suit."

(Reading.) "I think you understand from conversa-
6198 tion we had the other day on the decision regarding answer
to Dr. Wallach on his proposal to settle the Vis-O-Tube
suit, but this is to reply to your letter of September 13th and
to complete the record.

"I have, in the last few days, told Dr. Wallach we feel obliged to proceed with this suit to determine the merit of the patents in question."

Thus once more, your Honor, we see Dr. Wallach and Sylvania, the second largest cellophane producer, to the defense of independent Vis-O-Tube; but here we see a strange thing: For the first and only time in this long, long series of dealings in patents involving cellophane we see the defendant Du Pont taking the gamble, refusing the settlement and proceeding on with the infringement suit; and gamble it was, your Honor, for in this, the first cellophane patent matter which was permitted to go to final judgment, the defendant lost on all counts; and I submit Government Exhibit No. 2188 at page 2442, which is a letter from C. M. Albright to Mr. B. M. May dated September 23, 1936.

(The letter from C. M. Albright to B. M. May dated September 23, 1936, was received in evidence and marked, "Government Exhibit No. 2188.")

Mr. Fitzpatrick. Reading from the third paragraph on page 2442:

"The present status of these patents is fully reflected
6199 in the first paragraph of Mr. F. M. Pralatowski's letter
to Mr. J. E. Hatt under date of August 26th, 1936, as
follows:

" 'In accordance with the terms of the agreements with the Dobeckmun Company and the Humitube Company, we sued the Vis-O-Tube Company for infringement of patents which we had exclusively licensed jointly to Dobeckmun and Humitube. We lost the suit, the claims being held invalid.' "

Thus the defendant's original opinion, your Honor, as to the validity of these claims was conclusively confirmed.

The COURT. Mr. Fitzpatrick, I am not sure I like your illustration of saying that a patent infringement suit in a Federal court is in the form of a gamble.

Mr. FITZPATRICK. Your Honor, we believe—I have shown throughout all these patent activities that there is a certain amount of gamble.

The COURT. It seems to me not a very high compliment to the Federal judiciary.

All right, pass it.

Mr. GESELL. This is a situation, your Honor, that the Government has in my view completely misconceived and misunderstood, and while it is clearly last year's bird's nest once removed, because it all died out in 1936, eleven years before this case was brought, I would like to cover it so that we can keep the facts in some sort of proportion.

Now, what happened here was very simple. As Exhibit
6200 2831 shows, both Dobeckmun and Humitube had patents
relating to the solvent sealing of moistureproof cellophane.
That sealing was of importance quite beyond the fields of activity that those two concerns were engaged in, the manufacture of cigar pouches, because many Du Pont customers were required to seal cellophane, whether they were Reynolds, who was making a cigarette package, or any one of hundreds of other customers. This was an imporant field, in other words, to keep open for the sale of cellophane, and if Reynolds had gotten an exclusive license or anyone else had gotten an exclusive license it would have retarded the development and sale of cellophane—the development and sale of moistureproof cellophane; and I don't think I have to remind your Honor that at this time Du Pont was the only manufacturer of moistureproof cellophane, June 11, 1931, and the product patent had issued.

6201 So what Du Pont's interest was was to keep this situation
open so that it would not be retarded in the sale of cellophane.

Look at what the basic exhibit says: "Inasmuch as the existence of these two patents covering as they do principles of sealing so generally used in connection with automatic wrapping machinery constitutes a source of continual nuisance and irritation to our customers and the further possibility that they may retard the use of cellophane, it appears important that this company acquire these patents so as to be in position to grant licenses thereunder and to remove the potential annoyance to our customers."

I say that is a highly and entirely legitimate motive. That was in Exhibit 2831, at the start of it.

So Du Pont bought the patent and granted licenses to both Humitube and Dobeckmun so that they might manufacture the pouches in which they were intersted. And Du Pont was thereafter entirely free to license anybody else by implication through the sale of its products or otherwise to seal packages other than cigar pouches. So the field was kept open for the development of its cellophane sales.

Even as to cigar pouches, your Honor, there was no limitation here to Dobeckmun and Humitube. True, they got the exclusive right, the two of them, to make pouches and resell them to cigar manufacturers, but Du Pont was careful in the
6202 agreements, as is shown at page 2399 of Exhibit 2173, to
retain to itself the right to license cigar manufacturers so that they could make their own pouches and wrap their own cigars, which they did. And if it is of any interest to the Government, that is the way cigars are wrapped today, and the business that Humitube and Dobeckmun had of this kind has disappeared, and the answer to your Honor's question as to what percentage of the business is involved here is, zero.

Now, a suit was brought on these patents and when they were declared illegal Du Pont did not appeal, Du Pont did not try it in any other district, as the documents show, and the reason the suit was brought is that the contract with Dobeckmun and the contract with Humitube contained in paragraph 3 at page 2406 in one case and page 2399 in the other, a specific contractual obligation to bring suit. And Du Pont lived up to that, brought the suit, the patents were declared invalid, and that was the end of it. That was in 1936. It brought suit because it was contractually obligated to bring suit.

The Court. Would anybody at your counsel table have the citation of that case?

Mr. Gesell. It is not reported, your Honor.

The Court. I simply want to look at it for background material.

Mr. Gesell. I would be glad to provide the Court with a
copy of the opinion which I don't have in court but which
6203 I can provide tomorrow. But it is not a reported decision.
If your Honor wishes, I will bring it in and hand it up to the Court.

The Court. No, I thought if I had a moment I would just glance at it for background material, but it is not necessary.

"200 shares of voting common stock to duPont Cellophane Co.

"510 shares of voting common stock to Freund.

"290 shares of voting common stock to be sold by Freund."

It is to be noted that this ownership of 200 shares of voting stock in the Visking Corporation would give Du Pont a voice in the management of Visking wherein policy matters are decided.

6233 Mr. Gesell. The agreement provided we would have someone on the Board of Directors. That has already been read.

Mr. Roache. The Government introduces into evidence Government Exhibit 324 at page 836.

(Inter-office communication from B. M. May to L. A. Yerkes dated April 6, 1933, was received in evidence and marked "Government's Exhibit No. 324.")

Mr. Roache. This exhibit is a Du Pont inter-office letter from B. M. May to L. A. Yerkes, President, dated April 6, 1933. The first paragraph is the pertinent one and the one I will read:

"In the contract of October 1925 with the Visking Corporation we gave Visking exclusive licenses under three patents (since expired) to use those inventions exclusively in the sausage container field. Visking in turn gave us exclusive licenses under their patents for all uses except in the sausage container field, reserving for themselves the entire rights in that field. In our general relationships with Visking we have tried (and I think successfully so far) to establish the general principle that in the field of viscose we will keep out of their pasture and they out of ours in all its broad ramifications. I doubt if we could stop them, however, if they should decide to broaden their activities. I doubt if from the Visking Corporation's own standpoint it is a good policy to be engaged in such a restricted field—an evolution in sau-
6234 sage might ruin them. It seems to me they will in time realize this. The matter is of interest to DuPont both from the standpoint of a stockholder and from the standpoint of some form of future competition."

The Court. Well, that is 65 exhibits for today. I think I am going to adjourn. Adjourn Court until ten-thirty tomorrow morning.

(At this point the trial was adjourned to Thursday, May 3, 1951, at 10:30 o'clock a. m., Eastern Daylight Saving Time.)

* * * * * * *

6239 Thursday, May 3, 1951, 10:30 O'clock, A. M., E. D. S. T.

Present: As before noted.

Mr. Roache. Yesterday, your Honor, I introduced the agreement between Visking and Du Pont Cellophane and Rayon Companies wherein I pointed out in Paragraphs 4 and 5 there were

Mr. Gesell. Now, I want to turn to one specific document here, your Honor, which is the only remaining issue that I can see presented——

The Court. May I inquire on one statement you made, about the percentage of the business, and you said it was zero. Is that presently or in 1947 when this suit was brought?

Mr. Gesell. '47, your Honor. My understanding is that the business of making these pouches individually, selling them to a cigar manufacturer who opens them up and inserts a cigar in them is a thing of the past, and the cigar manufacturers as of '47 and earlier were wrapping with their own machines which they also had a right to do under these agreements from the beginning. That is not to say, of course, that cigars are not wrapped in cellophane, as your Honor is probably aware they are.

The Court. While we are on that—you do not mind these pauses, do you?

Mr. Gesell. No.

The Court: I saw an ad in the New York Times Sunday, I believe it was, from Dunhill's, 50th and Fifth Avenue,
6204 tobaccos, and they were advertising the cigars and giving with the purchase a batch of cellophane tubing. The advertisement went on to say that a cigar had to breathe and it ruined its quality if you encased it in the cellophane tubing. Therefore it went on to recite that you only insert the cigar in the tubing when you are going out to take a walk or visit some place to protect it. Can you help me on that?

Mr. Gesell. Well, as I understand it, there has been considerable research in developing a type of cellophane which will permit a degree of breathing. I take it that was an advertising effort by that cigar manufacturer——

The Court. To sell cigars?

Mr. Gesell. To sell cigars, and still keep some advantages of the cellophane wrap, your Honor.

Of course, as your Honor is also aware, cigars have gone into other kinds of materials, which I am not permitted to mention until a later date, because of the advantages of those materials as against cellophane.

Exhibit 2180, your Honor, is the document that remains for discussion, at page 2428. This paragraph was read, and to focus attention on it I would like to read it again. It talks about the licensing and it says, "The implied suggestion to them is also that they will have no license to so handle other so-called Moisture-proof material, and we will not have weakened our patent
6205 position in this respect by knowingly permitting violation on the part of some of our trade, using some of their wrapping materials in the form of competitive products."

contained provisions dividing the fields of manufacture, Visking to manufacture sausage casings and or artificial weasands, and Du Pont to have the use of the patents for all other purposes, the effect of this division of fields being to exclude Visking from the manufacture of cellophane and caps and bands.

As I left off yesterday I was introducing and discussing exhibits interpretive of the parties' understandings of the agreement and the intent of Du Pont to exclude Visking from participating in the manufacture of cellophane and caps and bands by the division-of-fields proviso in the said agreement.

Continuing now, the Government introduces Government Exhibit 4092 at page 3841. This exhibit is a Du Pont report from L. A. Yerkes, President of the Du Pont Rayon and Cellophane Companies to the Executive Committee of E. I. du Pont de Nemours & Company dated July 3, 1935, subject "Technical Agreement between the Visking Corporation and Du Pont Cellophane Company, Inc.-Du Pont Rayon Company."

6240 (The report from L. A. Yerkes to Executive Committee dated July 3, 1935, was received in evidence and marked, "Government Exhibit No. 4092.")

Mr. Roache. This contains the report of the opinion of the Legal Department after reviewing the agreement between Du Pont and Visking. Note that the first paragraph states that the Cohoe patents which Du Pont licensed Visking on in 1925 expired in 1932, and the contract is still in effect.

The portion of the exhibit I intend to read appears on page 3842. Starting at the last complete paragraph, I read:

"While there is no express provision in the agreement which limits the business of the Visking Corporation to casings and weasands or excludes Cellophane and Rayon Companies from this field except as follows from the exclusive licenses therein provided for, it is my opinion that the spirit of the agreement was that Visking should confine its activities to the casing and weasand field and that Cellophane and Rayon Companies should have exclusive rights in the viscose field, exclusive of casings and weasands."

Skipping over to the first complete paragraph on page 3844:

"Our association with Visking has been extremely profitable, not only from the substantial dividends received, but without Visking machines for our cellulose bands business we would not be occupying our present preeminent position in that industry."

6241 I would like to comment here that not only is Visking a potential competitor, but this is brought out by the fact that they make the machines which Du Pont used for the bands business; so that there is no question they could have been a manufacturer of bands, but this agreement prohibits them from manufacturing bands.

Continuing reading:

"We feel quite confident that Visking is satisfied to keep within its field of sausage casings, but the future may develop a different base than viscose. Du Pont may or may not envisage going into the sausage casing business, but in view of this association with Visking it would appear unlikely except in conjunction with Visking."

6242 The Government offers in evidence Government Exhibit 4093 at page 3845.

(Report from Development Department, Du Pont, to Executive Committee, dated August 6, 1935, was received in evidence and marked "Government's Exhibit No. 4093.")

Mr. Roache. This is a Du Pont report from the Development Department to the Executive Committee prepared by N. P. Wescott and approved by W. J. Beadle, dated August 6, 1935. It is entitled "Visking Relationship."

The first part of the report with the heading "Recommendation" states that after a comprehensive investigation it has been recommended that the Visking-du Pont relationship continue on the basis of the contract of October 20, 1925. Now, this is in 1935, and in a previous letter Du Pont stated that their Cohoe patents had expired in 1932 and here they are still operating under an exclusive cross-license agreement with Visking.

Mr. Gesell. There were other patents.

Mr. Roache. They don't appear.

Mr. Minicus. We have looked for other patents, we haven't found them; I presume Mr. Gesell will expose them on the defense.

Mr. Roache. The agreement of 1925 which they refer to in this letter contains three patents, the Cohoe and Fox and two other Cohoe patents, all of which have expired.

6243 Skipping over to the bottom of 3847, I will read the first paragraph under the heading "Effect and Limits of Present Contract."

"Under the original contract, now in effect, to which the parties are Mr. Freund and the Visking Corporation on the one side and the Du Pont Rayon and Cellophane Companies on the other, the required exchange of information is confined to viscose as a base material. Within that field, each side is obligated to give the other full information and rights on all its own discoveries and technical advances. In making use of this common stock of information, Visking must confine its activities strictly to the manufacture and sale of sausage casings; and on the du Pont side the obligation is recognized to refrain from any invasion of the sausage casing field. This interpretation of the not very explicit language of the contract is fully confirmed in the ten years of practice which have taken place under it. In the course of our present investigation, the opportunity was afforded to secure a full and positive statement from Mr. Freund of his view of the rights and obligations of the present contract; and his expressions were, on every point, quite clearly and positively in accord with the interpretation we have just stated."

This makes it quite clear that paragraphs 4 and 5 of the original contract dividing the fields of operation excluded Visking from operating in Du Pont's field.

6244 The remainder of the report up to the conclusion deals mainly with the attitude of the Visking management and whether or not du Pont should attempt to get a broader agreement with Visking for du Pont's protection. However, it was decided that the present agreement was satisfactory.

Now I will read at page 3851 the first paragraph of the Conclusion:

"This consummation, in our judgment, is fully as satisfactory from the standpoint of the du Pont Company as if the suggestion of enlarged contractual obligations had been realized. In a relationship of this sort, we believe, the spirit of the parties is of vital importance: and in this case the spirit which we find to prevail apparently leaves nothing to be desired."

This exhibit leaves no doubt but that the agreement meant and that each party understood it to mean and so conducted their business according to that meaning that Visking was excluded from participating and competing in the manufacture of cellophane and other viscose products except the limited manufacture and sale of sausage casings.

The Government introduces into evidence Government Exhibit 4121 at page 3889.

(Report from Rayon Department, Du Pont, to Committee on Patents, dated October 30, 1914, was received in evidence and marked "Government's Exhibit No. 4121.")

6245 Mr. Roache. This is a Du Pont report from the Rayon Department to the Committee on Patents, subject "Cancellation of Technical Agreement with the Visking Corporation." It is dated October 30, 1911. This exhibit shows that Du Pont and Visking had come to an understanding to cancel the technical agreement of December 31, 1925, as the purposes and objectives of the agreement had been accomplished.

I will now introduce evidence relative to the negotiations leading up to and the license agreement to Visking under the Fletcher patent which will further prove the limitations not only in this license agreement but also in the basic agreement of October 20, 1925.

Mr. MINICUS. I believe it would be very possible for me to make certain statements in the course of an invesigation
6209 that the Department of Justice would not feel responsible for. In this case the Examiner admitted that he had not made his report to the Commission yet. He was still a field investigator. I have done a lot of investigating for the Government, your Honor, and I know of no single instance in which I have ever had the authority to express myself concerning the merits of a case before I have reported to my authorities.

Mr. GESELL. You don't suggest any case was brought after this report was made, do you, because there wasn't any. I don't understand what all this is about, your Honor.

Mr. MINICUS. As to the second point, your Honor, Mr. Gesell has stated that the purpose here was to open up the entire field to this thing. There seems to be some confusion about what the field was. These patents were sealing patents. They applied to any sort of moistureproof cellophane. The question of these little bags in which the cigar was inserted just came along because the cigar bag was sealed by these sealing licenses. But what the field was not opened to were people who wanted to buy cellophane and seal it. The license label took care of that. If you didn't have that little label on the package of cellophane that you bought, and you only had it if you bought it from Du Pont, you couldn't seal the stuff. And moistureproof cellophane is practically no good at all without sealing. It is made into bags, to cover cigar, cigarette packages, and so on, and so forth. And it was that
6210 license label that was attached to those packages that foreclosed people going to the other manufacturer of cellophane and buying a package of his cellophane and using it in conjunction with this.

But I want to point out the real important thing in this situation, your Honor. At the very beginning of the documents it was read that Du Pont considered both the patents that Dobeckmun had and the patents that Humitube had were invalid. And sure enough the Federal Court confirmed their belief some years later. But in the meantime this industry was subjected to these restrictions, whatever they were, under this group of invalid patents that Du Pont stated to be invalid at the time they acquired it from sources outside the Du Pont Company and it was invalid at the time of the decision.

Mr. GESELL. We have it on the record that the patent part of the case is a "dead horse", your Honor, and my main purpose here is simply to focus attention upon how dead that horse is in relation to the time this complaint was brought. I don't intend to argue the patent case in its entirety at all, but just deal with some simple undisputed facts.

First, as of the time of the complaint, as between Du Pont and Sylvania licenses were non-exclusive, there was no obligation to grant licenses under future patents; no mutual consent clauses, no extra royalty provisions—non-exclusive, no extra royalty, no future patents, no mutual consent. Both parties were free 6211 to license anyone they chose under their own patents. The product patent had expired. The process patents, the basic ones, were to expire a year later. The Marathon agreement, about which we heard so much, had expired with the expiration of the product patent. The flameproofing agreement had expired with the end of the war. The ribbon arrangement had been dead since March, 1940. The sealing arrangement had been dead since 1936. There was a license as to the ultra-violet light patents covering less than a half of one per cent of the business non-exclusive, royalty-free.

6212 We come to the end of this patent case, your Honor, part of the case, with a complete absence of proof on many issues which the Government has tendered, but which they have not been able to support. Why, your Honor, they haven't even dealt with the fact that in 1946 before the complaint was filed Sylvania was taken over by a new concern, the largest manufacturer of viscose in the United States who from that time on was responsible for Sylvania's operations.

Now, consider the enormous failure of proof against the words of the trial brief. There is no proof that licenses were needed by anyone to manufacture cellophane as of the date of the complaint. The Government has not pointed to a single patent and when it has read the document it skipped the reading of the claims. Your Honor has no proof offered as to the relative importance of patents. In this highly theoretical case your Honor does not know what patents are in the industry. Your Honor has not been told what patents Sylvania has, what patents American Viscose has, what patents Celon has, what patents other people have. We have had talk about numbers of patents, but no effort to appraise their significance, no effort to show whether, and if so to what extent, they have any economic effect or importance in this industry; and yet we hear talk about pooling of resources, we hear talk about building up networks of patents; and the Supreme Court and Judge Knox in the Aluminum case recently and other courts have constantly said—the Supreme Court no later 6213 than last year—that numbers of patents don't mean anything; and just as the Government tendered issues on the interferences without ever reading the file wrappers or caring what the issues were, so they sought to tender this case to you even without the patents, and except for your Honor's judicial notice of the patents they would not be before you now.

the intent to exclude contained in that basic agreement.

6250 Now, as evidence of how Du Pont upheld its part of the agreement when licensing others under its patents I refer to Government Exhibits 2242, 2254, and 2296 already in evidence.

Government Exhibit 2242 is an agreement between Du Pont Cellophane Company and the Celon Company wherein Du Pont licensed Celon under the Webster patent No. 1,647,489 and the Fletcher patent No. 1,997,769. In this agreement on page 2566 in Paragraph 3 it is provided that Celon will not use the license for the manufacture and/or sale of sausage casings and artificial weasands.

Government Exhibit 2254 is an agreement between Du Pont de Nemours & Company and the Celon Company wherein Du Pont licensed Celon under the Vautier and Fays United States Letters Patent No. 2,141,776 and reissues thereof. In this agreement on page 2585 in Paragraph 3 Du Pont again excludes Celon from manufacturing sausage casings and/or artificial weasands under these licenses.

Government Exhibit 2296 is an agreement between the Du Pont de Nemours & Company and the Sylvania Industrial Corporation wherein Du Pont licensed Sylvania under the Webster patent No. 1,647,489, Fletcher 1,997,769, and Vautier and Fays 2,141,776, and in turn Sylvania licensed Du Pont under the Dalton patent 2,161,561, Dalton 2,220,221, and Dunn 2,361,825. In this agreement at page 2647, in Paragraph 1 it is provided that Syl-
6251 vania will not use the licenses for the manufacture, use, and/or sale of sausage casings and/or artificial weasands.

The Court. Mr. Roache, will you kindly explain to me again the relevancy at this point of the last three exhibits; that is, 2242, 2254, and 2296.

Mr. Roache. Well, the basic agreements here provide for division of fields, and the division of fields gave to Visking, of course, the sausage casing manufacture and to Du Pont all the rest. Now, I wanted to show that Du Pont lived up to the agreement as well as Visking; that whenever Du Pont licensed anyone it lived up to this agreement by making sure that everyone else was excluded from the sausage casing manufacture which it had said Visking could have to itself.

The Court. Just roughly, what was the date of the last three exhibits? I want to see that in juxtaposition with the original agreement which was in 1925.

Mr. Roache. 2242 was in May of 1936.

The Court. That is enough.

Mr. Roache. And 1940.

The Court. That is enough.

My only purpose in pointing this up at the end of their case is to emphasize the broad gap that exists between their statements and their proof, between their surmises and actuality, and to emphasize to the Court that at the time this complaint was brought no agreement existed barring others, and that there has been no proof as to patents which barred others, and that your Honor does not know whether any of the patents are of any consequence at all; and we have been most of this time concerned with a few of the agreements which have been selected for particular emphasis, all dead and gone before the case was brought.

Mr. Minicus. This, your Honor, is a very unusual time in this case, I must agree with Mr. Gesell. Everything is dead and gone. The patents are dead and gone, the agreements are dead and gone—everything is dead and gone but the monopoly, and that is what we have been talking about. Everything is purged but this monopoly structure, this 75% control that has perpetuated itself down through the years back to the beginning of the industry. But Mr. Gesell can't deny that somewhere back of that 75% control—it might have been a year back or in some cases three 6214 years back of it—were all these patent practices, the ones that the Government has so carefully gone through, and we have established our proof. There isn't any doubt about that. The Hartford Empire case is quite clear on the matter, and the court in the Hartford Empire case said, in effect, even though a defendant may have purged itself of all of these abusive practices in the past, while the structure still stands that structure has got to be taken down, and that is what we have left here, and this is a Section 2 case; this is not a Section 1 case alleging specific restraints of trade under abuse of this patent here, a tie-in clause here, or a patent pool over here. This is a Section 2 case, and the one thing that is aimed at is that monopoly structure. We have only shown these things, as we have said in the beginning we were, to show that this monopoly was no accident, this monopoly was nothing thrust upon this defendant. This monopoly was achieved steadily, progressively through practices just as we have found in the monopoly section and just as we find in the foreign section, and we will find some more of them in the section to come, and that is what we are attacking in this case. I made a caveat to that remark in my opening statement that the plaintiff would be ever vigilant to see that the issues were not side-tracked along a Section 1 violation.

Everything was dead and gone, as Mr. Gesell said, but that monopoly.

6215 We come now to a section designated under the Roman numeral IV in the index as "Defendant's Practices and Policies Regarding Potential Competition." This section is also

Mr. ROACHE. Now, in March of 1943 Du Pont broadened Visking's field of operation, and I want to introduce some documents now which will show that they had this broadening agreement and that the division that resulted still gave to Du Pont sheet cellophane and caps and bands.

6252 The Government introduces into evidence Government Exhibit 4100 at page 3860. This is a letter dated March 25, 1943, from William S. Pritchard to B. M. May, in which it is requested that Du Pont release Visking from the exclusive license agreement of October 20, 1925. This is in 1943, and these patents expired that Du Pont had given licenses—under which Du Pont had given licenses to Visking, one in 1930 and one in 1932, and here they are in 1943 talking about exclusive license agreements on expired patents.

(The letter from William S. Pritchard to B. M. May dated March 25, 1943, was received in evidence and marked "Government Exhibit No. 4100.")

Mr. GESELL. I think this should show, your Honor, that Mr. Pritchard is writing in his capacity as counsel for Visking, a point which apparently Mr. Roache has overlooked. Mr. Pritchard is counsel for Visking in the writing of this letter.

Mr. ROACHE. I don't see where it makes any difference. It is still the understanding that it is an exclusive license agreement. He is writing asking for release from an exclusive license agreement so that the suit between Visking and Sylvania can be settled, the reason for the release being that some question might arise in view of the limitations in the agreement as to whether the license Du Pont will grant to Sylvania could cover casings other than used for sausages.

6253 The letter goes on to say that in Paragraph 5, Subparagraph (b), page 4 of the agreement of October 1925, wherein Visking was confined to the manufacture and sale of sausage casings, Visking is excluded from the manufacture and sale of casings for other meat food products. However, Du Pont has consented for the past ten or fifteen years to Visking's selling these casings for meat food products other than sausages. This bring out how effectively Visking was excluded from everything but casings for sausages. They had to get Du Pont's consent before they could use casings on a product that would seem to go hand in hand with sausages—meat food products.

6254 The Government introduces into evidence Government Exhibit 4101 at page 3862.

(Copy of resolution headed "Formal Broadening of Exclusive License to the Visking Corporation under Cellulose Casing Patents to Include Casings for All Meat Products," signed by Mr.

stated in the trial brief, which I notice has just been cited as the basis of our case—I think the last paragraph takes care of that in the trial brief—and this is under Roman numeral VI and covers Paragraphs 166 through 191.

At this time I would like to introduce Mr. Roache for the purpose of continuing the Government's presentation.

The COURT. Mr. Roache, are you going to follow the outline of your index as we go along? In other words, we are now to take up Roman numeral IV, Sub-section 1, Sub-sub-section (a)?

Mr. ROACHE. That is right, your Honor.

The COURT. As you pursue your discussion, as we come to a new sub or sub-sub-section just let me know. It helps me in the formulation of my notes.

Mr. ROACHE. Yes, your Honor.

In this section IV, your Honor, of the index and Section VI of the trial brief the plaintiff contends that in the assertion of the power to exclude, such power having already been shown in the monopoly section presented by Mr. Minicus, coupled with the intent and effect of maintaining and increasing its monopoly of cellophane and caps and bands the defendant has excluded certain potential cellophane competition and has suppressed 6216 the existing manufacturers of the products involved. Du Pont's monopoly position has been maintained by policies and practices which have had the effect of excluding and suppressing potential and existing suppliers. For this dual purpose of forestalling potential competition and to suppress the existing manufacturer of the products involved the defendant during the period covered by the complaint has entered into various agreements with the intent of maintaining its dominant position and monopoly powers in the cellophane and caps and bands industry in the United States.

Now coming to the first part of this section, the agreements executed by and between Du Pont and the Visking Corporation, a potential competitor, or person acting in its behalf, were intended to and did effectively exclude Visking as a competitive force in Du Pont's field of operation. The agreements executed by Du Pont and the Visking Corporation excluded Visking by means of a division-of-fields proviso from entering into the manufacture of cellophane and caps and bands.

I will now offer proof relative to Section IV Subheading 1 (b) of the index, and trial brief Paragraph 167 through 169.

The Government now offers into evidence Government Exhibit 4089 at page 3827. This is the agreement of October 20, 1925 made between Erwin O. Freund of Chicago, Illinois, designated

in the agreement as the first party, and the Du Pont
6217 Cellophane Company, designated as the second party, and
the Du Pont Rayon Company, designated as the third
party, wherein was also mentioned the Visking Corporation not yet incorporated and to be incorporated under the laws of Virginia, designated as the fourth party. This agreement was signed by Mr. L. A. Yerkes as President of the Du Pont Cellophane and Rayon Companies and by Erwin O. Freund.

(The agreement between Freund, Du Pont Cellophane Company, Du Pont Rayon Company, and Visking Corporation dated October 20, 1925 was received in evidence and marked, "Government Exhibit No. 4089.")

Mr. ROACHE. In the Whereas clauses there are listed eight patents and eleven applications owned by Freund and three owned by Du Pont Cellophane Company, and there is also stated the desire of the Du Pont Rayon Company to obtain certain license rights of the first party, and there is also stated the mutual desire to form a corporation to be the owner of the patents and applications owned by Freund and to be the exclusive licensee subject to conditions of the patents owned by Du Pont Cellophane Company.

Then it is stated that for sufficient consideration all the parties agree as follows, and then there follows seven numbered paragraphs, some with sub-sections.

Numbers 4 and 5 are the paragraphs that show the agreement
that Visking and Du Pont will not compete with each other
6218 by an agreement to divide fields of activity. Visking will
manufacture only sausage casings while Du Pont will reserve use of the patents to all other fields, the manufacture of cellophane and caps and bands being, of course, the fields of endeavor from which Visking is excluded.

Paragraph 4 at page 3829 reads:

"Second party will grant unto fourth party, subject to the conditions hereinafter stated, the exclusive right and license, free from royalties, to employ the inventions set forth in the patents above enumerated as being owned by the second party, for and during the life of said patents, in connection with the manufacture and sale of casings for any kind of sausage by whatever name known and/or artificial weasands and for no other purpose, said second party reserving to itself the exclusive right to the use of the inventions of said patents for all other purposes."

This is a provision that excludes Visking from manufacturing cellophane and caps and bands.

Mr. GESELL. No. Your Honor, it doesn't make any such provision.

Mr. Roache. That is the Government's contention which we will show by the various negotiations leading up to it and the understandings.

Then Paragraph 5, Sub-section (b), page 3830, states:

"(b) The fourth party will grant unto the second 6219 party and unto the third party, for their sole and exclusive use, subject to the conditions hereinafter stated, exclusive joint licenses, free from royalties, to employ the inventions set forth in the above mentioned patents and applications for patents of said first party, for any and all purposes, except the purpose of the manufacture and sale of casing for any kind of sausage by whatever name known and/or artificial weasands, the exclusive rights for the expected purposes being reserved to said fourth party."

These two paragraphs give the division of fields, Visking to have the right to manufacture sausage casings and/or artificial weasands——

The Court. What is that last?

Mr. Roache. Weasands is the animal casing in tubular form in which they pack meat.

Visking to have that field of operation and Du Pont to have all other fields, it of course being interested in sheet cellophane and caps and bands.

Then the last page of the exhibit at page 3834 states:

"The Visking Corporation above described as the fourth party having been organized and having duly adopted, ratified and confirmed the foregoing agreement, does hereby execute the same in token of its acceptance of the terms and conditions thereof.

"Dated the 12th day of December, 1925.

"The Visking Corporation, by Guy B. Hazelgrove, President." 6220

In conjunction with that agreement there was also executed two license agreements which I will now introduce.

The Government introduces Government Exhibit 4090 at page 3835. It is a license agreement dated December 31, 1925, whereby Du Pont grants an exclusive license under the three Cohoe patents to the Visking Corporation and re-states and incorporates the provisions of the agreement of October 20, 1925, dividing the fields of operation, and thereby excluding Visking from the manufacture of cellophane except as relates to the manufacture of sausage casings.

Mr. Gesell. Your Honor, I don't want to interrupt Mr. Roache, but I do feel since we are interpreting a contract I should note on the record my very strong disagreement with his interpretation of these contracts which are being characterized.

(The license agreement between Du Pont Cellophane Company and Visking Corporation dated December 31, 1925, was received in evidence and marked "Government Exhibit No. 4090.")

Mr. Roach. The license agreement reads:

"Whereas, Du Pont Cellophane Company, Inc., a Delaware Corporation, of Buffalo, New York, is the owner of Letters Patent of the United States, as follows:

Cohoe and Fox, 1,070,776, granted August 19, 1913 Sausage and Casing Therefor.

Cohoe, 1,458,400, granted October 26, 1915 Casings for Sausages.

6221 Cohoe, 1,163,740, granted December 14, 1915, Apparatus and Process for Making Tubes; and

"Whereas, Visking Corporation, a Virginia Corporation, having an office at Chicago, Illinois, is desirous of acquiring an exclusive license under said patents for the purposes hereinafter expressed, pursuant to an agreement between the parties hereto and other parties, dated October 20, 1925;

"Now, Therefore, be it known that Du Pont Cellophane Company, Inc., for One Dollar and other sufficient good and valuable consideration, receipt whereof is acknowledged, hereby grants unto said Visking Corporation, subject to the conditions stated in the above-mentioned agreement, the exclusive right and license, free from royalties, to employ and practice the inventions set forth in the above enumerated patents, throughout the world and during the life of said patents, in connection with the manufacture and sale of casings for any kind of sausage by whatever name known and/or artificial weasands, and for no other purposes, said DuPont Cellophane Company, Inc. reserving to itself the exclusive right to the use of said inventions for all other purposes;

"It is understood and agreed that the exclusive license herein granted shall extend so far as applicable to any improvements in the field of viscose which Du Pont Cellophane Company, Inc. may make or acquire and shall extend through the life of any patents acquired, and the patents for any improvements thereon.

6222 "Said Du Pont Cellophane Company, Inc. further agrees to impart unto said Visking Corporation all information it possesses or may acquire, applicable to the business of said Visking Corporation, during the continuation of this license on the subject of viscose and/or relating to the manufacture thereof, and also to aid said Visking Corporation, in the planning and erection of a plant and in the manufacture of its product.

"This license shall continue for the life of the patents referred to as an exclusive license in and for the field granted, unless it shall be lawfully revoked by said Du Pont Cellophane Company, Inc. in accordance with the terms of the above-mentioned agreement; and should the license be revoked as an exclusive license, said Visking Corporation shall, nevertheless retain a non-exclusive license in accordance with the provisions of the above-mentioned agreement.

"This license is non-transferable and non-assignable. It is given and accepted pursuant and subject to the terms and conditions of the agreement of October 20, 1925, which agreement and the terms and conditions thereof are made a part of this license as fully as if the same were repeated at length herein.

"In Testimony Whereof, Du Pont Cellophane Company, Inc. has caused this instrument to be executed by its duly authorized officers this 31st day of December, 1925.

6223 Du Pont Cellophane Company, Inc.
By (S) L. A. Yerkes, *President.*

Attest:
M. Du Pont Lee,
Secretary.

6224 The Government offers into evidence Government Exhibit 4091 at page 3838.

(License agreement from Visking Corporation to Du Pont dated December 31, 1925, was received in evidence and marked "Government's Exhibit No. 4091.")

Mr. Roache. This is a license agreement of December 31, 1925, wherein Visking Corporation grant to Du Pont exclusive license to practice the inventions in 11 patents and 9 applications. It restates and incorporates the provisions of the agreement of October 20, 1925, dividing the fields of operation and excluding Visking from all fields which are reserved to Du Pont excepting sausage casings.

The first page lists the patents and the applications. Inasmuch as this agreement is similar to the other one, I will read the "Now, Therefore," clause on page 3839:

"Now, therefore, be it known that for One Dollar and other sufficient good and valuable consideration, receipt whereof is acknowledged by Visking Corporation, said Visking Corporation hereby grants unto said Du Pont Cellophane Company, Inc. and Du Pont Rayon Company, jointly and severally, licenses exclusive as to all except said two named licensees, free from royalty, to practice the inventions set forth in said patents and applications and any improvements thereon which said Visking Corporation possesses, or may acquire, throughout the United States and 6225 the foreign countries mentioned, for the life of the patents and any further patents which may be granted, unless sooner terminated in accordance with the provisions of a certain agreement between the licensor, the licensees and Edwin Oscar Freund, dated October 20, 1925, for any and all purposes and uses, except the purposes and uses of the manufacture and sale of casings for any kind of sausage by whatever name known and or artificial weasands, the exclusive rights for the excepted purposes and uses being reserved to said Visking Corporation."

I would like to note that Visking is also bound to license under future patents not yet thought of.

That is all I will read on that one.

I wish to introduce at this point the Government exhibits which are interpretative of the parties' understanding of the terms of the agreement, which will establish the intent to exclude Visking from participating in Du Pont's field of operations.

First in this group would be Du Pont and Visking's own statements of intent and their statements explanatory of the agreements, which of course would be probative of Visking's exclusion.

The Government introduces into evidence Government Exhibit 4442 at page 6199.

(Inter-office memorandum from Mr. Sparre to Mr. Yerkes dated October 29, 1923, was received in evidence and marked "Government's Exhibit No. 4442.")

6226 Mr. Reache. This is an inter-office communication from Mr. Sparre, Director of the Development Department to L. A. Yerkes, President, Du Pont Cellophane Company, dated October 29, 1923, entitled "Cohoe Patents."

It states, "Dr. Weglein, Director of the Mellon Institute, called today in order to discuss with me the Cohoe patents, particularly from the standpoint of whether his principals might acquire the right to operate under these patents which the du Pont Cellophane Company purchased a month ago for $26,000. Dr. Weglein explained that the Mellon Institute had been working for several years on the manufacture of sausage casings from viscose, the work being paid for by Mr. Freund connected with Oppenheimer and Company of Chicago. The purpose of this work was to develop a process for the manufacture of sausage casings, at least as the primary object. They were thoroughly familiar with the Cohoe patents which they have known of for several years and which their patent attorney had told them were basic in nature, so that they would not be able to manufacture sausage casings without infringing the Cohoe patents. At the same time they have developed what they consider a process which is very superior to the Cohoe process. For instance, they do not force the viscose solution through a die but apparently draw the solution out. Dr. Weglein felt confident that they had a novel method and which might be of considerable value to the manufacturer of other
6227 viscose products, possibly silk and cellophane. In fact Dr. Weglein stated that his principals had been working

with cellophane for several years but had developed a superior method of manufacture."

This of course shows Visking's—not Visking at this point but Dr. Freund's potentiality as a possible manufacturer of cellophane.

"Mr. Freund had an option to purchase the Cohoe patents in the event that the George W. Helme Company would not acquire the patents, and they were rather confident that they would become the owners of these patents. They were therefore considerably surprised and very much taken back when they learned very unexpectedly of the Helme Company's purchase of the patents and when they thereupon learned that it was the du Pont Company who had acquired these patents.

"Dr. Weglein therefore came down to ascertain whether they could somehow or other obtain rights to make use of the Cohoe patents, inasmuch as otherwise their whole development would be useless to them. Dr. Weglein felt that it should be possible to make an arrangement because he said they had patents on a superior method for the production of the casings and which they had covered by pending applications for patents.

"I told Dr. Weglein that it was the duPont Cellophane Company who had purchased these Cohoe patents and not the duPont Company, but that I was a director of the Cellophane Company
and therefore familiar with the proposition. I stated that
6228 we had bought the Cohoe patents for the purpose of con-
trolling as far as possible the patent situation as effecting our interests and inasmuch as we had paid a substantial amount of cash for these patents and considered our connection with the George W. Helme Company as being an asset, that we of course felt that we possessed something of decided value. Further, I stated that we considered cellophane sheets as our special business and if we made any arrangement at all in connection with the Cohoe patents it would only cover the manufacture of tubes, so that viscose in sheets would be reserved for the du Pont Cellophane Company. Dr. Weglein thought that this would be entirely acceptable to Mr. Freund.

"I told Dr. Weglein that this business was entirely now in the hands of the duPont Cellophane Company and that it would be best if Mr. Freund would communicate direct with you as president of that company. Dr. Weglein is going to Chicago in the very near future and you will therefore probably hear from Mr. Freund at an early date, in fact he will no doubt arrange for an interview with you within the next week or ten days."

I will not bother with the last paragraph.

The Government introduces into evidence Government Exhibit 4443 at page 6201.

(Letter from Erwin O. Freund to Mr. F. Sparre dated November 18, 1923, was received in evidence and marked
6229 "(Government's Exhibit No. 4443.")

Mr. Roache. This is a letter from Erwin O. Freund to Mr. F. Sparre, Development Department, Du Pont, dated November 18, 1923. Mr. Freund writes referring to the conversation held between Mr. Weglein and himself in Wilmington and then briefly outlines his research attempting to develop suitable casings for sausage. He feels he has found a suitable casing but might possibly infringe the Cohoe patents which Du Pont had just recently purchased. He goes on to say, and I read commencing with the second complete paragraph on page 6202:

"It was originally my intention to propose to you that you sell me the exclusive right to manufacture tubes, but in view of the almost certain attacks which will be made on the validity of those patents by the combined interests whose business would be impaired by an artificial casing, I am sure it would be far better if I owned the patents. Having for many years been an integral part of these combined interests, I can only hint that there would be considerable hesitation about attacking me where there might be none about attacking you.

"With these preliminaries, I now propose to you that the Du-Pont Cellophane Co. sell the above mentioned patents to me at a reasonable price while I in turn would then give to them full and complete rights under these patents in every line except the manufacture of tubes. And furthermore, I would agree not to make viscose sheets or any of the products made
6230 from sheets. Thus the Cellophane Co. would be securing all of the protection and rights of the Cohoe patents at no cost, eliminating a possible competitor, and securing the good will of a fellow viscose investigator. It is no remote possibility that in the course of our own lengthy research we may have learned some things of viscose which would help your business and you will always find me ready to reciprocate any favors you might show me now. If the proposition I am making you now appears incomplete in any detail you may inject into it any such other provisions as do not interfere with the main thing I want, i. e., protection against possible trouble through the Cohoe patents when we commence making tubes of viscose."

That is all I will read of that.

The Government introduces into evidence Government Exhibit 4444 at page 6204.

(Resolution of Board of Directors of Du Pont at meeting held September 25, 1924, was received in evidence and marked "Government's Exhibit No. 4444.")

Mr. ROACHE. This is a resolution made by the Board of Directors of Du Pont. It reads:

"Whereas, the Board of Directors at Meeting of September 25, 1924, discussed at length the question of the sale to E. O. Freund of the sausage casing rights under the Cohoe Patents owned by this Company, and,

"Whereas, various suggestions were advanced as to
6231 the kind and scope of possible arrangements that would fully protect this Company in its viscose activities and at the same time provide participation in profits that may result from the development of sausage casing business, and,

"Whereas the President in a special report dated October 4, 1924, outlines a tentative arrangement, that seems to protect this Company in both the major considerations discussed, therefore,

"Be it resolved that the President be and hereby is authorized to conclude, with advice of counsel upon various details, such arrangements as will make effective and binding the arrangements outlined in special report of October 4, 1924."

The Government introduces into evidence Government Exhibit 4445 at page 6205.

(Report from L. A. Yerkes to Board of Directors, Du Pont Cellophane Company, Inc., dated October 4, 1924, was received in evidence and marked "Government's Exhibit N 4445."

Mr. ROACHE. This exhibit is a Du Pont report from L. A. Yerkes to the Board of Directors of Du Pont Cellophane, dated October 4, 1924. It is the report referred to in the preceding document. The report is a plan of the agreement to be executed between Mr. Freund and Du Pont. It reads: "Sausage Casings—Cohoe Patents."

"The following is an outline of a plan which Mr. Freund has not accepted but which I believe he will
6232 eventually accept.

"A new company will be formed for the manufacture of sausage casings from viscose. This company will acquire exclusive manufacturing and sales rights from the Cellophane Company under our Cohoe patents,—exclusive in the sense that neither the Cellophane nor the Fibersilk Company will manufacture casings nor will they sell any other rights to any other company. This new company will also agree, if it can be so arranged in any legal manner, not to manufacture anything else except sausage casings.

"This new company will be capitalized as follows:

"1,100 shares of common stock will be issued, 1,000 of these voting and 100 of them non voting, distributed as follows:

"100 shares non voting common stock to be given to two men in the Mellon Institute who have done the experimental work.

The Government introduces into evidence Government Exhibit 4113 at page 3875, a duPont letter from F. M. Pralatowski to B. M. May, Assistant General Manager, Rayon Department, dated June 21, 1939.

(Letter from Mr. Pralatowski to Mr. May dated June 21, 1939, was received in evidence and marked "Government's Exhibit No. 4113.")

Mr. Roache. I introduce into evidence Government Exhibit 4112 at page 3874, a duPont letter from B. M. May to F. M. Pralatowski dated June 23, 1939.

(Letter from Mr. May to Mr. Pralatowski dated June 23, 1939, was received in evidence and marked "Government's Exhibit No. 4112.")

6246 Mr. Roache. Also Government Exhibit 4111 at page 3873, a duPont letter from F. M. Pralatowski to B. M. May dated June 27, 1939.

(Letter from Mr. Pralatowski to Mr. May dated June 27, 1939, was received in evidence and marked "Government's Exhibit No. 4111.")

Mr. Roache. Also Government Exhibit 4110 at page 3872, a duPont letter from Charles F. Daley, Patent Attorney, to Mr. B. M. May dated June 7, 1939.

(Letter from Mr. Daley to Mr. May dated June 7, 1939, was received in evidence and marked "Government's Exhibit No. 4110.")

Mr. Roache. Also Government Exhibit 4109 at page 3871, a duPont letter from B. M. May to F. M. Pralatowski dated September 8, 1939.

(Letter from Mr. May to Mr. Pralatowski dated September 8, 1939, was received in evidence and marked "Government's Exhibit No. 4109.")

Mr. Roache. Also Government Exhibit 4108 at page 3870, a duPont letter from Charles F. Daley to F. M. Pralatowski dated October 27, 1939.

(Letter from Mr. Daley to Mr. Pralatowski dated October 27, 1939, was received in evidence and marked "Government's Exhibit No. 4108.")

Mr. Roache. Also Government Exhibit 4114 at page
6247 3877, a duPont letter from F. M. Pralatowski to E. G. Hess,
Special Assistant of the Rayon Department, dated October
31, 1939.

(Letter from Mr. Pralatowski to Mr. Hess dated October 31, 1939, was received in evidence and marked "Government's Exhibit No. 4114.")

6248 Mr. Roache. These exhibits are all letters between officials of the Du Pont Company, and these letters discuss Visking's request for license under the Fletcher patent which

Visking needed to enable it to print on wet casings. They discuss the necessity of obtaining the permission of the Viscose Development Company, a corporation existing under the laws of the United Kingdom, for such a license. The conclusion to be drawn from these letters is that the agreement between Du Pont and the Viscose Development Company is for use only in Du Pont's field of operation, but Visking can obtain a license providing it uses it only on casings.

I read from the first paragraph on page 3878 of Government Exhibit 4114:

"This grant lies outside of the du Pont-Visking agreement but the license has been written to be coextensive therewith; namely, limited to sausage casings and artificial weasands made from viscose."

The Government introduces in evidence Government Exhibit 4115 at page 3879. This is a report of a resolution adopted by the Executive Committee of the Du Pont Company authorizing L. A. Yerkes, General Manager, or B. M. May, Assistant General Manager, Rayon Department, or the President or any Vice-President of the Company to execute an agreement licensing Visking under the Fletcher patent providing its use by Visking is limited to the manufacture, use and/or sale of sausage casings
6249 and artificial weasands made from viscose. This meeting was held November 8, 1939.

(The report of resolution at meeting of Executive Committee of Du Pont held on November 8, 1939, was received in evidence and marked, "Government Exhibit No. 4115.")

Mr. Roache. The Government introduces into evidence Government Exhibit 4117 at page 3881. This is a copy of the licensing agreement dated November 10, 1939 between Du Pont and Visking signed by B. M. May and Erwin O. Freund of Visking, wherein Visking was granted a license under the Fletcher patent No. 1,997,769.

(The copy of agreement between Du Pont and Visking dated November 10, 1939, was received in evidence and marked, "Government Exhibit No. 4117.")

Mr. Roache. Page 2 of the agreement, page 3882 of the bound volume, Paragraph 1, contains the provision limiting Visking's use of the patent to the manufacture and sale of sausage casings and artificial weasands made from viscose and providing further that the license is exclusive to Visking. Needless to say, this was just another means utilized to exclude Visking from the manufacture of cellophane and caps and bands.

This license under the Fletcher patent was drawn to coincide with the basic agreement of October 1925, which is probative of

Fisher, dated March 23, 1943, was received in evidence and marked "Government's Exhibit No. 4101.")

Mr. Roache. This is a true and correct copy certified by M. D. Fisher, Assistant Secretary of the duPont Company, of a resolution adopted by the Executive Committee of duPont on March 26, 1943. The resolution authorized L. A. Yerkes or B. M. May or the President or Vice President to send a letter to Visking covering formal reassignment of all the rights duPont has in the agreement of October 20, 1925, for sale and use of sausage casings and tubing for packaging meat food products other than sausage casings and artificial weasands.

The first and second "Whereas" clauses restate the provision limiting the manufacture and sale by Visking which now includes meat food products along with the sausage casings and/or artificial weasands.

The Government introduces into evidence Government Exhibit 4103 at page 3864.

(Letter from Mr. May to the Visking Corporation dated March 26, 1943, was received in evidence and marked "Government's Exhibit No. 4103.")

6255 Mr. Roache. The exhibit is the actual broadening agreement letter dated March 26, 1943, signed by B. M. May and by Erwin O. Freund of Visking on March 30, 1943. The agreement specifically states that except for the sale of casings for meat food products the provisions of the agreement of October 20, 1925, are not affected, either directly or indirectly. In other words, the exclusion from duPont's field of operation is still in effect.

The Government offers into evidence Government Exhibit 4106 at page 3867.

(Proposed draft of letter duPont to Visking dated July 6, 1944, was received in evidence and marked "Government's Exhibit No. 4106.")

Mr. Roache. This is a draft of an agreement letter to be sent to Visking for Mr. Freund's signature wherein duPont specifically outlined its field of operations so that there would be no misunderstanding. The exhibit shows that the field of operation duPont had chosen for its exclusive use, which field is the same as has already been presented to the Court——

Mr. Gesell. May I interpose here on a question of accuracy. This carries the statement "not agreed to in confab with Daley and Pritchard," and Mr. May's initials, and it is my understanding that 4106 is a proposal made by Mr. Pritchard as counsel for Visking.

Mr. Roache. I said it was a draft of an agreement to be sent to Visking. I never said it was sent to Visking. 6256

Mr. Gesell. It came from Visking. Again you are overlooking that Mr. Pritchard in these documents is acting as counsel for Visking.

Mr. Roache. It is signed "Yours very truly, E. I. du Pont de Nemours & Company."

Mr. Gesell. It is not signed at all.

Mr. Roache. Not signed, but it has the typewritten notation, "Yours very truly, E. I. du Pont de Nemours & Company."

Mr. Gesell. It was a letter, my understanding is, for our signature by Mr. Pritchard as counsel for Visking.

Mr. Minicus. The letter is addressed *to the Visking Corporation.*

Mr. Gesell. It states in the writing that it was not agreed to in the confab.

Mr. Roache. I didn't say it was agreed to. I didn't even say it was sent.

The Court. Well, check my understanding for accuracy. This is a letter prepared by counsel for Visking, submitted to duPont, asking duPont to execute it and return it to Visking?

Mr. Gesell. That is my understanding. And it was not agreed to by duPont.

Mr. Minicus. There is nothing on the record that shows he was counsel for Visking or duPont; Mr. Pritchard has acted as counsel for both companies in this matter.

6257 **Mr. Gesell.** There is no indication he was counsel for duPont at this time at all, your Honor, on this matter.

Mr. Minicus. The statement was made he was acting as counsel for Pritchard. That is the one we are taking objection to.

Mr. Gesell. Well, I move to strike the exhibit on the grounds that it has not been shown to be relevant or material, that its authenticity and genuineness has not been established, and it is not shown that duPont concurred in any way in the document.

Mr. Roache. The document has already been stipulated to by defendant, your Honor.

Mr. Gesell. I didn't know they were going to make the representations concerning it that they have made, your Honor.

Mr. Roache. The document was offered to show the field of operation duPont had selected for its own use. I think the document shows that.

The Court. I am going to allow the document to be admitted in evidence subject to the infirmities which you have placed upon it.

Mr. Minicus. May I submit once again, your Honor, that the defendant has already stipulated——

The Court. There is no further point for discussion. It is admitted.

Mr. Roache. Now, on January 25, 1945, duPont and
6258 Visking entered into an agreement cancelling the agreement of October 20, 1925, and the license agreement of December 31. However, the cancellation did not terminate the pattern of division of fields created under these agreements and so actually the exclusion of Visking by the division of fields has persisted.

The Court. Just wait a minute, Mr. Roache.

Mr. Minicus, what was the source of 4106? Where did you get it?

Mr. Minicus. 4106 was acquired from the duPont files.

The Court. Very well.

Pass on, Mr. Roache.

Mr. Roache. The purpose of these exhibits to come into evidence now, your Honor, is to show that this cancellation agreement in effect did not terminate this division of fields and that Visking and duPont were still excluded one from sausage casings and the other from cellophane and caps and bands.

The Government introduces into evidence Government Exhibit 4107 at page 3869.

(Unsigned document dated July 14, 1944, was received in evidence and marked "Government's Exhibit No. 4107.")

Mr. Roache. This is a document taken from the duPont files and evidently is a memorandum for the files and is dated July 14, 1944. There is no signature on the document, but its tenor indicates that it was written by an official of the duPont Company. It discusses proposed changes in the agreement
6259 indicating that Visking wanted more than its small field of sausage casings.

The last paragraph states:

"Despite all of the foregoing, I am inclined to feel that duPont (retaining existing licenses, modified as above) is willing to grant all you ask if along with it there is a formal termination of the agreement. To the latter I see no objection from the standpoint of either company. I frequently feel it would be a happy solution since the interpretation of the agreement has caused more discussion than has ever been warranted and as an instrument of peace between the companies it has been a failure when compared with the personal intercourse which has been so pleasant throughout the years."

The Court. I don't know whether it will be put into evidence, and I don't care particularly whether it is or it is not, but I would like to make an inquiry and either Mr. Gesell or Mr. Minicus can answer it for me. In terms of production, of output, what does this Visking-duPont relationship amount to?

Mr. Gesell. Well, your Honor, as far as Visking is concerned, its sales in 1947 were in excess of $17,000,000. It is the bulk, in other words, of the band tube field.

The Court. Alone?

Mr. Gesell. Yes. It is the bulk of the business by far.
6260 duPont's percentage of tubes and bands, one being simply
a longer band than the other, is about less than 25 per cent.

The Court. I will put the question to you, Mr. Minicus. How many competitors does Visking have with reference to this particular type of product?

Mr. Minicus. As to the sausage casings, your Honor, I understand they have two competitors, Transparent Packaging Company, and the Sylvania Company makes some sausage casings.

Mr. Gesell. They also compete with duPont and Celon. And when I come to my comments, your Honor, I propose to discuss in detail the problems of the part of trade and commerce that are presented by this particular part of the proof.

The Court. I suppose I am anticipating.

Mr. Gesell. I was waiting until the evidence got in before I raised that point.

The Court. Very well, sir.

Mr. Minicus. I would like to point out that this business of bands has been lumped together now and I have pointed out myself consistently all the way through that there is no substantial difference between a sausage casing, such as Visking makes, and a band for liquor bottles, such as duPont and Celon make, the only difference being that the band for sausage casings is a longer band to provide room for the sausage. The band, of course, for
the liquor bottle is a short band. And that is the entire
6261 point being made here. When those bands were used on
liquor bottles duPont made them; when they were used for sausage casings, Visking made them.

The Court. And the method of manufacture was the same? That was that illustration you gave me, am I not correct, when they were exuded out of the machines?

Mr. Minicus. That is correct, your Honor.

Mr. Roache. In fact, your Honor, one of the documents I read shows that duPont got its machines from the Visking Corporation.

The Court. Now, so that my notes will be clear, you are on Government's Exhibit 4107?

Mr. Roache. Yes, I just passed it.

I now introduce into evidence Government Exhibit 4098 at page 3858, which is a letter from the Legal Department, Patent Division, of duPont, to the Visking Corporation, dated October 2, 1941.

(Letter from Legal Department, Patent Division of duPont, to the Visking Corporation, dated October 2, 1944, was received in evidence and marked "Government's Exhibit No. 4098.")

Mr. ROACHE. I will just read paragraph 2 of the letter:

"With reference to Articles 1 (a) and 1 (b)—", which are to be incorporated in this new agreement——

Mr. GESELL. Before we go on, I don't like to keep interrupting, your Honor, but is it the Government's contention
6262 that this document was signed and is an agreement between the parties?

Mr. ROACHE. No.

Mr. GESELL. Ought we not make it clear when we are reading drafts and when we are reading understandings and contracts? This was not signed, your Honor.

The COURT. Well, it seems to me, Mr. Gesell, that for my benefit at least that on those occasions where the Government does not specify what the actual fact is with respect to the document, I want you to interrupt, so that I will have an accurate comprehension of what I am listening to.

Mr. GESELL. While I am on my feet, the same is true as to the prior exhibit which bears the notation "Not sent."

Mr. ROACHE. I never did say the document was sent.

Mr. GESELL. You never said whether it was or wasn't. That is the difficulty.

Mr. ROACHE. This one I am reading was not sent. From all indications it was not sent. It is not signed. The one I am on now has no indication it was sent. There are no signatures on it.

The COURT. Then what is the purpose of having me listen to it?

Mr. ROACHE. It is to show the interpretation to be placed on this agreement that I am going to present. This paragraph 2 here indicates that the agreement supposedly was can-
6263 celled, yet in effect all it was was a change from an exclusive license agreement to a non-exclusive license agreement.

Mr. GESELL. The actual agreement is coming and it has all the terms in it.

Mr. ROACHE. The actual agreement doesn't state that it has been changed to a non-exclusive. This indicates definitely that they understood that it was to be a non-exclusive agreement, and the contract was to be the same, the terms.

So I will pass that document and go on and introduce Government Exhibit 4129 at page 3898.

(Agreement between the Visking Corporation and E. I. du Pont de Nemours & Company dated January 25, 1945, was received in evidence and marked "Government's Exhibit No. 4129.")

Mr. Roache. This is the agreement cancelling the agreement of October 20, 1925, and December 31, 1925 and containing the additional provisions that have just been referred to. The agreement is signed by Erwin O. Freund, President of Visking, and B. M. May. The date is January 25, 1945.

I read starting at page 3899:

"Now, Therefore, in consideration of the premises and other good and valuable considerations each by the other in hand paid, receipt whereof is hereby acknowledged, and in consideration of the covenants and conditions hereinafter set forth, the parties hereto agree as follows:

"1. The agreements of October 20, 1925 and December
6264 31, 1925 are hereby cancelled as of the date first above written, and each party releases the other from any claim which it may have for any loss, cost or damage because of said agreements, said cancellation, however, being subject to the following conditions:

(a) Du Pont, for itself and its subsidiaries, present and future, shall continue to enjoy, non-exclusively and without payment of any royalty, the right to practice the inventions and to use the information provided for in said agreements and obtained from Visking, which inventions and information Du Pont or its subsidiaries were commercially using at the date of this agreement.

(b) Visking, for itself and its subsidiaries, present and future, shall continue to enjoy, non-exclusively and without payment of any royalty, the right to practice the inventions and to use the information provided for in said agreements and obtained from Du Pont, which inventions and information Visking of its subsidiaries were commercially using the date of this agreement.

(c) Said non-exclusive rights provided for in Articles 1 (a) and 1 (b) above, shall not be limited to the specific form of said commercial use at the date of this agreement, but may be exercised to the extent originally provided for in said agreements of October 20, 1925 and December 31, 1925."

6265 This is the agreement which the Government contends is merely changing the former agreement from an exclusive license to a non-exclusive license agreement, still licensing under three patents expired in 1930 and 1932.

The Court. I do not get that at all. How can you give a license that would cover an unexpired patent?

Mr. Roache. That is what they are attempting to do. You can't license a person on an expired patent. But the terms of this agreement call for non-exclusive licensing under the patents of the 1925 agreement, and the 1925 agreement contains only three patents which Du Pont gave to Visking, the Cohoe and Fox, which expired in 1930, and two other Cohoe patents which expired in 1932?

Mr. GESELL: I might point out, your Honor, that the agreement doesn't say it is licensing patents. It says it is licensing inventions, and reference back to the earlier contract will show that inventions other than patented inventions were licensed.

6266 The COURT. My difficulty is I can't conceive that two companies having competent and rational management would enter into a license agreement for patents that had long since expired, practically a generation ago, and I yet haven't got the import of the agreement. If it is not that, what is it?

Mr. ROACHE. It is only an agreement in writing, an understanding that there will be a division of fields between these two companies. That is the only point I am trying to bring out in these documents, that continuously down through the years there was this division of fields that show in these contracts.

The Government introduces into evidence Government Exhibit 4143 at page 3905. This is a letter from Erwin O. Freund of Visking to Benjamin May of Du Pont dated January 22, 1945.

(The letter from Edwin O. Freund to Mr. Benjamin M. May dated January 22, 1945, was received in evidence and marked, "Government Exhibit No. 4134.")

Mr. ROACHE. (Reading.) "DEAR BEN: I have your letter of January 17th and, in spite of your modesty, which in this case might be founded on facts, I still prefer to think of you as omnipotent and as such responsible for the clearing of the cancellation of our technical agreement. Don't begrudge me that little bit of hero worship.

"Seriously, although we will henceforth have only the meagerest contractual ties, I believe that the twenty years of 6267 unbroken favorable relationship between our two companies cannot but have engendered such mutual confidence and respect that our future relations will be on a high plane of understanding."

Reading the letter in the light of Du Pont and Visking's past relations which affected a true division of fields and in light of the statement made in Government Exhibit 1092 already in evidence at page 3851 where Du Pont said when speaking of its relation with Visking:

"In a relationship of this sort, we believe, the spirit of the parties is of vital importance; and in this case the spirit which we find to prevail apparently leaves nothing to be desired."

The COURT. Don't you think that two companies which have done business over a period of years could have mutual admiration for one another? What are you putting, a lurid motive on this thing?

Mr. Roache. No, I am interpreting that to mean they had this understanding, that they cooperated with each other in this division of fields, and it was a very distinct understanding.

The Court. That is good will.

Mr. Roache. Well, it is good will by two companies agreeing not to compete with each other, if that is good will. That is restraint of trade.

I will introduce at this point a group of documents
6268 which will show cooperation between Du Pont and Visking
wherein supposedly the agreement of 1925 was cancelled. It is evident that the division of fields still remained. I will not read the documents but just introduce them for that purpose.

I introduce into evidence Government Exhibit 4136 at page 3907; Government Exhibit 4137 at page 3908; Government Exhibit 4139 at page 3910; Government Exhibit 4141 at page 3912; and Government Exhibit 4140 at page 3911.

(The letter from G. H. Andrews to Mr. J. P. Smith of the Visking Corporation dated January 18, 1946, was received in evidence and marked, "Government Exhibit No. 4136.")

(The letter from J. P. Smith to Mr. G. H. Andrews dated January 21, 1946, was received in evidence and marked, "Government Exhibit No. 4137.")

(The letter from B. M. May to Mr. Erwin O. Freund dated November 14, 1946, was received in evidence and marked, "Government Exhibit No. 4139.")

(The letter from A. J. McAllister of Du Pont to Sino Java, etc. dated May 26, 1947, was received in evidence and marked, "Government Exhibit No. 4141.")

(The letter from G. H. Andrews to Mr. J. P. Smith of the Visking Corporation dated February 10, 1947, was received in evidence and marked, "Government Exhibit No. 4140.")

Mr. Roache. That is all the exhibits I am going to offer.

6269 The Court. That last group of five exhibits, what do they show?

Mr. Roache. That although supposedly this agreement was terminated, that these exhibits show that they still observed this division of fields.

The Court. All right.

Mr. Roache. I believe, your Honor, that the exhibits I have just introduced and discussed have established the fact that Du Pont through these agreements of October 20, 1925 and December 31, 1925 by this division of fields did effectively exclude Visking from the manufacture of cellophane sheets and caps and bands; that it was Du Pont's specific intent and the very definite meaning of the agreement that there would be this division of fields.

A few documents have also been introduced to show that Du Pont had a stock interest in this company and was on the Board of Directors, which indicates that they had a chance to observe the practices of the Visking Company.

This agreement actually was very illegal from the outset. Actually it was an attempt at a cross-license agreement wherein fields of manufacturing were divided, thus depriving the public of the benefits of competition and thereby creating restraint of trade that resulted not from the granting of the letters patent, but from the agreement.

6270 Later in 1945 a new agreement was drawn up changing the exclusive licensing to a non-exclusive. However, it did not change the division of fields, which continued and has continued up to the time of the complaint. These agreements were restraints of trade perpetuated by Du Pont to maintain its monopoly position in the industry. It is clear evidence of intent to monopolize.

Mr. Gesell. Might I suggest, your Honor, our mid-morning recess at this time so that I can arrange my paper?

The Court. Yes, sir.

At this time I want to advise counsel of the following: Since my last statement as to our next recess I have been required to rearrange my calendar, and therefore after tomorrow we shall recess to Thursday, May 17th, instead of Wednesday, May 16th. From that date on; that is, from Thursday, May 17th, until June 1st I suggest that the parties after consultation will select what dates they want reserved for them and advise me accordingly. I will leave that to you. You two get together and tell me what you want.

(At this point a brief recess was taken.)

6271 Mr. Gesell. Before turning, your Honor, to a discussion of the documents, I would like to deal with the question your Honor raised and which we had intended to bring up as soon as this proof came in, because it is a very fundamental question that in our opinion goes to the very heart of this aspect of the case. I refer, of course, to the question of what is the part of trade and commerce involved.

duPont is charged with monopolizing caps and bands. These two products have been lumped together and statistics presented to show that duPont's production accounts for approximately 63 per cent of the caps and bands. And, as I understand it, it is the Government's theory that caps and bands are a distinct part of commerce that can be monopolized under Section 2.

Well, since these Visking documents have come in, the record now establishes that in defining this part of commerce a very significant portion of what the Government calls the industry has been omitted, namely, regenerated cellulose tubing, a product that is made, among others, by Visking, Celon and Sylvania.

I want to emphasize, your Honor, that I am discussing this on the Government's theory of how one determines a part of trade and commerce, on the Government's theory of what constitutes the monopolized field, and we say that on their theory as tendered in their case in chief tubes must be included with caps and bands. Certainly the Government isn't entitled to
6272 make a purely arbitrary determination of the industry in
order to be able to concoct statistics which suit its particular purposes. And tubes are left out here because duPont doesn't make very many of them.

Now, as your Honor is aware, I am not talking here about other competing materials. I am directing myself to the Government's theory. The Government has rejected the test which duPont urged and which we will continue to urge as the proper test for determining the part of trade and commerce monopolized, namely, the totality of the products which compete on a functionally interchangeable basis for the same use.

The Government says, as I understand their theory, that the use to which a product is put is not the test, and recognizing that they can't merely arbitrarily select a product, the question arises, what are the tests that the Government would apply on its theory of the case? And I think the record has made clear that there are three tests, the chemical similarity of the product, the method of its manufacture, and third, whether it is a product of the cellulose industry.

Tubes meet all three of those tests, and we say must be included with caps and bands. Bands, if your Honor please, are but a species of a tube and the same is true as to sausage casings. Bands and sausage casings are all of the genus tube, the product is tubes. Casings are long tubes, bands are short tubes.

6273 Now, we had a confession this morning from the Government that there is no substantial difference between tubes and bands, and we had it at page 870 of the transcript of January 31st that tubes and bands, according to the Government's own statements, are made from viscose and by the same machinery. It is extruded and one is the long of it and one is the short of it, and our exhibits show that have just been introduced, 4113 and 4092, that they are made of the same machines.

Now, I ask your Honor with that in mind how can the Government say that there is the distinction between a band and a tube but no distinction between plain cellophane and moistureproof cellophane? That 600 gauge plain Tango cellophane, such as I

handed to your Honor the other day, is the same as 300 gauge moistureproof transparent heat-sealed and anchored, or what we know in this case as M. S. A. T. film? The plain fact of the matter is that the bands and the tube are all the same product, and they are of the same chemical similarity, and I emphasize I am talking the Government's theory now, your Honor, not ours; and is there any question but they are part of the same industry? They are made by Celon, they are made by many of these alleged foreign co-conspirators, as a whole host of exhibits show, they are made by Sylvania, and even to some extent by Du Pont both directly and to the extent that Du Pont as a stockholder participated in Visking's manufacture; and we also have it in evidence, if there
6274 is any further doubt about it, that they are used frequently for comparable purposes in the marketplace—wrapping baked and meat products, ham butts, both in tubes and in cellophane.

I am not arguing any question of substitute material, but merely the question of what is the proper part of the industry to be used in determining monopoly on the Government's own theory of the case? They have admitted at pre-trial—and there is a formal order to that effect—that they are not charging any monopoly of the long tubes, the sausage casings, but they are charging a monopoly of the short tubes, bands. The proof now shows that bands and tubes are all one and the same thing.

There is no evidence as to how much the sale of tubes amounts to, but we have it from recognized sources such as Moody's that they are very substantial and that Du Pont's percentage is way, way down if the true product is looked at, and I urge and submit, your Honor, that there has been a sufficient showing on the Government's own documents to justify a dismissal of that portion of the case charging monopoly of caps and bands.

That completes my discussion of that phase of the problem, your Honor. Unless the Court has any questions, I will turn to a discussion of the documents pertaining to Visking.

The Court. Will you elaborate just a little more on why there is an insufficiency of proof of monopoly with reference to caps and bands (tubes)? I want to be certain I have it.

6275 Mr. Gesell. It is our view, your Honor, that having now in the record shown that bands and tubes are the same thing, all of the evidence concerned with bands is concerned with but a portion of the part of trade and commerce which is the only proper part on the Government's theory of the case that we can be charged with monopolizing.

The Court. And on the basis of the answer you made to my inquiry this morning, Visking, for example, does a $17,000,000 business.

Mr. Gesell. Yes.

The Court. With respect to this type of product:

Mr. Gesell. With respect to tubes.

The Court. Go on with your discussion.

Mr. Gesell. Of course, I am obliged to mention, your Honor, that this arbitrary selection by the Government of their particular products has finally come a cropper, as you may have seen in the recent trade regulation reports. They brought the strawberry ice cream case finally. They charged monopoly of condensed evaporated goat's milk, and after a proper interval dismissed the case on their own motion.

The Court. Who did, the F. T. C.?

Mr. Gesell. The Anti-Trust Division, your Honor.

The Court. The Anti-Trust Division?

Mr. Gesell. A monopolization of evaporated goat's milk.

6276 Mr. Minicus. I think that should be stricken from the record.

The Court. No, I asked the question on the first day of trial with reference to a monopoly of vanilla ice cream.

Mr. Minicus. May I reserve the right to find out the reason and background for that dismissal and put it in the record at a subsequent point?

The Court. You are at liberty to.

Mr. Minicus. Thank you, sir.

Mr. Gesell. I intend, your Honor, to take these documents up in some detail, but I want first to paint a brief picture here of what we have been dealing with. In his concluding remarks Government counsel stated that the benefits of competition had been denied, the trade had been restrained, and that Du Pont's monopoly had been enhanced. Well, what do these documents show? They show that an individual named Freund entirely on his own, with great persistence, had been working in Chicago and elsewhere trying to find some way of making a sausage casing and had gotten some grants from the Mellon Institute, and he was persevering in that work, and before it had reached any kind of commercial success it turned out that Du Pont had bought a Cohoe patent which contained important disclosures to Du Pont with respect to the use of glycerin as a softener, and this Cohoe patent stood in the way of Mr. Freund's proceeding with his experimental efforts to make sausage casing.

6277 Now, mind you, your Honor, this was in 1923. We were supposed to be concocting a conspiracy to keep Mr. Freund out of caps and bands and preserve that to ourselves, and it was not until many years later, 1929, that we even got into the band business, and we were not even under way in the cellophane business.

But this little inventor came to us and said, "Your Cohoe patent blocks me." And what did this great, tyrannical monopolist do

They said, "We will give you a license under the patent; we will assist you in organizing your company; we will help you to construct your plant; we will give you the necessary technology and assistance; you may have use of some of our technicians; we will put up stock in the enterprise so you get enough capital to go ahead; and we will go on your Board to help you out."

The Court. What was Mr. Freund's first name?

Mr. Gesell. Erwin.

And Mr. Freund's business, which was then simply a struggling effort on his part, as the Government's documents show that we don't have, working in an abandoned bathroom as his laboratory, with Du Pont capital, with Du Pont patents, with Du Pont personnel to help him, with construction assistance, grew and flourished into where it was a $17,000,000 business in 1947; and that is the factual basis underlying this situation which is 6278 presented to your Honor as their key case of exclusion of competitors who wanted to make cellophane. I don't believe there could be a more graphic illustration of the gap which I have been referring to between the trial brief and the proof and this.

Mr. Minicus. May I just make a note of our objection to the characterization of the Visking case as our key illustration. We do not consider the Visking case any greater illustration of exclusion than all these other exclusions we brought in, your Honor.

Mr. Gesell. It is the lead-off situation, your Honor. You can judge when you see the rest of it whether there is anything that has any more substance that this.

When the contracts were read our assistance in the organization of the company was not read. These documents were also presented, your Honor, completely in a non-chronological basis. What I want to do is see if I can't discuss them chronologically in an effort to tell the story that these documents tell.

The first one is Exhibit 1442 at page 6199, and is the document dated in 1923 where Mr. Yerkes reports that the Director of the Mellon Institute had come in to see him, and the Director of the Mellon Institute explained that Mr. Freund had been working for several years on the manufacture of sausage casing from 6279 viscose; that the purpose of this work, the purpose of Freund's work was to develop a process for the manufacture of sausage casing as the primary object. He is not talking cellophane; he is talking manufacture of sausage casing; and Mr. Weglein of the Mellon Institute and it subsequently appears that this chemist who helped Freund got some stock free for their contribution, said they had been advised by their attorneys, their patent attorneys, that the Cohoe patents were basic in nature so they would not be able to manufacture sausage casing without infringing the Cohoe patent. So here are Du Pont's patents that it had acquired for other reasons unrelated to sausage casing standing in the way, and Mr. Weglein even went so far—and this is the clause that was misread or misinterprted by Government counsel—went so far as to say that his principals, meaning Mr. Freund, had been working with cellophane for several years but had developed a superior method of manufacture. In other words, they found a better method of manufacturing sausage casing than from cellophane, and he wanted to know what Du Pont would do. He said he thought it would be possible to make an arrangement because they had patents on a superior method for the production of casings, and that that would be acceptable to Mr. Freund if they could get rights under the patent to make those casings, because that is what he was interested in.

6280 The next document is a letter written by Mr. Freund after this took place, 4443, still in 1923, at page 6201, and he understands why duPont acquired the Cohoe patent because there is a claim covering the use of glycerine as a softening agent and it is of great interest to duPont in its proposed manufacture of sheets. You understand duPont was not really under way in 1923, your Honor. And who suggested that the license be limited? Mr. Freund, in this letter. He said, "I want to make these casings, and if you give me rights there, that is what I want." And we gave him the patent and took a fifth of an interest in this speculative venture, and we said we would help him, and along comes the documents showing the nature of the agreement which was reached, one, 4089, relating to the organization of the company, and the other, 4090, licensing specific patents. And under these contracts we committed ourselves to give Mr. Freund the right to make sausage casings under patents and under our technical information. It was understood that duPont would go on the Board and it had a fifth interest in the venture. And in the license contracts there was no prohibition against Mr. Freund using developments of his own unrelated to viscose, to do whatever he wished with it, but we said he couldn't use our information except for the field in which he was interested.

So the agreement went along on a very friendly basis. There were many references back and forth to our cordial
6281 relations, our friendly relations. We were intimately concerned in the operations of the Visking Corporation. And I don't know to this moment whether Visking is said to be a coconspirator in this case—they are not named in the complaint—

or whether they are not said to be a co-conspirator; but whatever the Government's theory is—and some day it may emerge—I see no particular thing wrong in the fact that we discussed in our letters back and forth that we were friendly with them.

The COURT. Does the record show, in January, 1945, when the cancellation of the agreement occurred, what happened to duPont's stock interest in Visking?

Mr. GESELL. The record offered by the Government does not, your Honor. duPont withdrew, sold the stock interest before this suit was brought.

The COURT. And that has not been shown?

Mr. GESELL. That has not been shown in the Government's case. It won't be disputed, I am sure.

Mr. MINICUS. It will not be disputed provided the date of the withdrawal is also put into the record, your Honor.

The COURT. The what?

Mr. MINICUS. The date of duPont's withdrawal. I think Mr. Gesell can provide that.

Mr. GESELL. It took place over a long period of years, your Honor. There was a gradual diminution of the stock interest.

6282 The COURT. Pass on.

Mr. GESELL. These letters that are written at the time of the termination to Mr. May of course relate to the fact that Mr. May had been active in this enterprise, on the Board for quite some time, and with the cancellation of the agreement and the change of the relationships, the elimination of the stock interest, it is not unusual that there would be cordial expressions of good will back and forth.

The question has been raised as to whether the contract was subject to some interpretation different than its actual wording, and that is the next group of documents that come along.

First is an opinion from Mr. Hanley looking at the contract himself in which he says that the ambiguous and indefinite language of the agreement does not permit conclusions free of doubt in the expression of his opinions, and the Executive Committee therefore directs that the Development Department discuss the matter with Visking and make sure that there is no difference of opinion in the construction of the agreement.

Then we have a report written at the time by the Development Department, as early as 1935, quoting Mr. Freund's views as to the meaning of the contract, in which, for example, he says, "If we were to find out how to make a satisfactory new wrapping film from gelatin, for example, I believe we would be entirely 6283 free to go ahead and manufacture and sell the new product, but I doubt that we would want to do it." It is in quotes rom Mr. Freund, and there are others to the same effect in the locument indicating complete absence of a feeling on his part of a division of fields.

And again, if your Honor has occasion to glance at 4093, you will see also Mr. Freund's expressions of appreciation for the aid and assistance that he had gotten from duPont in this venture. And then very early the question came up as to whether it would be proper for him to make products to wrap meat. And we said, "Sure, go ahead." And this arrangement went along on that friendly basis during the entire period. We did not license others to make sausage casing under inventions which we had licensed Mr. Freund, because we had told him that he would have the exclusive rights in the sausage casing field. And so we naturally did not violate our contract in that regard or indeed in any other regard.

Finally, at the time of the cancellation we took only non-exclusive rights from him so that he was free to license others, making it clear only that he was not free to use our information in any way differently than it had been licensed to him from the outset.

Mr. ROACHE. I would like to take up Mr. Gesell's first point, your Honor. I would like to state at the outset that the Government has charged a monopoly of cellophane and caps and
6284 bands. In making this charge the Government did not make
the distinction between a tube and caps and bands, or bands. This distinction was made in the industry itself. We had nothing to do with it. The industry itself stated that sausage casings, they had nothing to do with, there is no interest in it, and thereby created their own monopoly in a specialized field, cellophane and caps and bands. The Government did not put the distinction there; the industry put it there. We wanted to be competitive; we want the sausage casing people to be able to come into this industry which they have set off as a separate and distinct industry which they have monopolized.

Mr. Gesell says that the sausage casing is made up of other companies. That is true, but the industry set them off by division of fields and would not let them in there. We want them in there; we want them to come in the cellophane and caps and bands field. The field they have monopolized is a separate and distinct industry.

Mr. Gessel states that you cannot monopolize caps and bands without taking into consideration sausage casings. Certainly you can monopolize, say, for example, a Phillips screw as compared with a slot screw. There is no question that the Phillips screw industry could easily be monopolized and there is no question of taking into consideration whether or not all the other screws came into competition with it, or were to be considered, rather, as part of it.

6285 Even in the Fashion Originators Guild, they took a select style of a dress and said they could monopolize the style of the dress. Here the industry itself has set off sausage casings and specifically monopolized and considered cellophane and caps and bands as their industry. That is the part they wanted. That is the part they monopolized. And the fact remains that they have still been excluded from competing in the cellophane and caps and bands field.

Whatever Mr. Gesell may say of the philanthropic purposes of the duPont Company, by this relationship duPont has removed a potential competitor —

The COURT. It brought it into existence. How could it remove it? You are directing your remarks to what Mr. Gesell said?

Mr. ROACHE. Mr. Gesell did not mention to the Court that Mr. Freund had been in the sausage casings business for years, his father had been in the sausage casings business before him, the duPont Company investigated Mr. Freund, the duPont Company found out that Mr. Freund probably knew more about the sausage casings business than anybody else in the business.

Mr. GESELL. Sheet guts, your Honor, not viscose.

Mr. ROACHE. Of course they had not started manufacturing it yet; that is what he was after, and he had found it, and he had found a process so much better than the Cohoe patent that he did not even want the Cohoe patent; he just didn't want to

6286 bother with infringement suits, and that is so stated in the letters that have been submitted.

The duPont Company in the negotiations with Mr. Freund said, "This will eliminate a competitor, a possible competitor, and also give us some money. We could join up with this man." They eliminated this potential competition from 1925 to the date of the complaint, and no patents existed to cover this exclusion after 1932.

Mr. Gesell makes the point that they were inventions. Even if we would admit, which we don't, that the cross-licensing agreement of patents restraining competition would be legal, you cannot license a secret process because once you license it, it is not a secret process any longer. So how could he justify this agreement of expired patents by saying they were on secret processes? Once they are made known, they are no longer secret, they are available to the whole world.

Mr. GESELL. I just have one comment about that, your Honor, to wind up this phase. There isn't a document, there isn't a shred of evidence that Visking ever wanted to, desired to, sought to, go in the band business or the cellophane film business.

Mr. Roache. Mr. Freund himself in his negotiations said this would be a good deal for duPont because it would eliminate a possible competitor.

The Court. What is the next chapter?

Mr. Roache. Now we come to the exclusion of Rainier.
6287 That is under paragraphs 170 and 171 of the trial brief and subhead 1 under Section 4 of the index.

Du Pont and Rayonier, Inc., a ranking supplier of wood pulp, specializing in types particularly suitable to the manufacture of cellophane and caps and bands, and who from the time of the agreement to October 31, 1937, operated as Rainier Pulp & Paper Company, entered into an agreement which excluded Rainier, a potential competitor, from engaging in the manufacture and sale of cellophane.

Mr. Gesell. Your Honor, I want to get something clear at the outset of this. There is no evidence being offered by the Government in support of their statement that it is the ranking manufacturer of wood pulp, and it is my information it is far from that.

Mr. Roache. I said "a ranking."

This agreement, in addition to excluding Rainier from competing and from engaging in the manufacture and sale of cellophane, provided Du Pont with certain discriminatory advantages in the procurement of the basic raw material over other producers of cellophane and caps and bands.

First I will show the exclusion of Rainier from engaging in the manufacture of cellophane and caps and bands and after that the discriminatory discounts and concessions acquired by Du Pont under the terms of the agreement.

First I will introduce documents showing the negoti-
6288 ations leading up to the Du Pont-Rainier agreement, which will clearly establish Du Pont's intent to exclude Rainier.

The Government introduces into evidence Government Exhibit 4006 at page 3708, which is an office memorandum from W. H. Farmer, New York Director of the Development Division of Du Pont, dated April 30, 1930.

(Office memorandum signed by W. H. Farmer dated April 30, 1930, was received in evidence and marked "Government's Exhibit No. 4006.")

~~Mr. Roache. It starts off by saying, "After~~ previous general discussion with Mr. Higgins of the law firm of Sullivan & Cromwell, respecting a proposal that the Rainier Pulp & Paper Company and the Du Pont Rayon Company enter into contractual relations, the following represents the main features proposed to be included in such an agreement."

6289 Then there appeared two headings: One, Du Pont Rayon Cellophane Contributions and Rainier Contributions, under which the provision, and I quote on page 3708, Paragraph No. 5:

"The Rainier Company would not directly or indirectly engage in the manufacture of rayon or cellophane.

"This agreement would be effective for an initial ten year period and provide for a renewal for another ten years if our company so desired."

That was one of the contributions Rainier was to make in this agreement.

In the last paragraph on page 3711 Mr. Farmer asked for the Executive Committee's comments.

I now introduce into evidence Government Exhibit 4003 at page 3701, which is a memorandum to the Executive Committee of Du Pont Rayon Company from E. K. Gladding, General Manager, dated May 19, 1930. It is entitled "Rainier Pulp & Paper Company—Du Pont Rayon & Cellophane Quality Pulp Agreement."

(The memorandum from E. K. Gladding to Executive Committee dated May 19, 1930, was received in evidence and marked, "Government Exhibit No. 4003.")

Mr. ROACHE. Mr. Gladding says in the first paragraph:

"Attached is Mr. Farmer's report showing the proposed agreement between the Rainier Pulp & Paper Company and the Du Pont Rayon Company * * *"

Then on page 3702, the first paragraph:

6290 "As I view the contract, it protects us against an increase in pulp prices, it gives us the advantage over all other purchasers for use in rayon and Cellophane with additional royalty on all that the Du Pont and affiliated companies use and a royalty on all other pulp used for the rayon and 'Cellophane' industries."

Here is the exclusion provision:

"It prevents the Rainier Company from entering into the manufacture of rayon or 'Cellophane'. As far as I can see, it is a very liberal agreement on the part of Rainier and I recommend that the agreement be approved."

The Government introduces into evidence Government Exhibit 4004 at page 3703. It is a Du Pont memorandum dated May 14, 1930, to Mr. E. K. Gladding, General Manager, Technical Department, from W. H. Farmer, Director of Development, and also is Mr. Farmer's report that was referred to in the preceding exhibit.

(The memorandum from W. H. Farmer to E. K. Gladding dated May 14, 1930, was received in evidence and marked, "Government Exhibit No. 4004.")

Mr. ROACHE. The subject is "Rainier Pulp & Paper Company—Du Pont Rayon and Cellophane Quality Pulp Agreement."

I will now read the first paragraph:

"As a result of my discussion with Mr. Higgins of Sullivan & Cromwell, respecting a proposal that the above two 6291 companies enter into contractural relations re the former company's wood pulp production suitable for rayon and cellophane ingredient purposes, following our company's declination to agree to Mr. Higgins first proposal covered by my memorandum of the 30th ult., he has not submitted the following rough draft of the Rainier Company's new proposal in its endeavor to eliminate the objections on which the first proposal was declined."

Now on page 3705 we see again the intent to exclude Rainier from the manufacture of cellophane. The first paragraph, No. 4 at the top of the page, I commence reading:

"The Rainier Company would not directly or indirectly engage in the manufacture of rayon or cellophane.

"5. It was not mentioned in to-day's discussion but in a previous discussion Mr. Higgins agreed that the proposed agreement would provide that the knowledges and services rendered by du Pont to Rainier would be confined by the latter to its interests and operations affected by this agreement.".

The Government introduces into evidence Government Exhibit 4001 at page 3698, which is a Du Pont memo to E. K. Gladding dated May 22, 1930, and it is from Mr. Hess, Secretary of the Executive Committee. It is entitled "Rainier Pulp & Paper Company—Proposed Agreement Covering Supplying us With Quality Wood Pulp. Executive Committee, May 21, 1930."

(The memorandum from F. G. Hess to E. K. Gladdings dated May 22, 1930, was received in evidence and marked, "Gov-
6292 ernment Exhibit No. 4001.")

Mr. ROACHE. It states:

"Referring to your letter of May 19th (No. 322), in connection with proposed agreement with the Rainier Pulp and Paper Company to supply us with quality wood pulp for our Rayon and Cellophane requirements, under which we could agree to supply technical assistance in connection with development of suitable material for our purposes,—

"This subject had been discussed in an informal meeting of the Committee on May 5, 1930 with you and Mr. Farmer, after review of tentative proposals contained in Mr. Farmer's memorandum, dated April 30, 1930.

"After detailed discussion with you and Mr. Farmer in yesterday's meeting, your letter was ordered filed, it being the unanimous feeling of the Committee that in negotiating for proposed agreement in this connection with Rainier, the following objectives should be sought and/or clarified, namely,

1. Definite agreement on part of Rainier never to engage in the manufacture of Rayon and/or Cellophane;"

The other provisions in here that are relative to discounts and royalties I will take up later.

The Government introduces into evidence Government Exhibit 4446, a memo dated September 13, 1930, to Mr. W. H. Farmer, Director, Development Division, New York Office, from E. K. Gladding.

6293 (The memo from E. K. Gladding to W. H. Farmer dated September 13, 1930, was received in evidence and marked "Government Exhibit No. 4446.")

Mr. Roache: It states:

"I am attaching the copy of the latest effort to present a satisfactory contract with the Rainier Pulp and Paper Company.

"As far as I can see this contract as it now stands reads a whole lot easier than the former one. That is, it is much easier to understand and I think an all-around better job.

"There are two things that come to my mind regarding this contract. First, on the terms of payment, it would be better if we could pay once a month, say the 16th prox. covering all shipments made during the previous month. This would cut down the work of the Treasurer's Department, in that they would have only one check to draw instead of 25 or 30.

"On re-reading the contract, several times, I could not find any definite statement that the Rainier Company would stay out of the manufacture of Rayon and Cellophane.

"I received your wire this morning and referring again to Article XV, I believe that the thought is really implied and I presume the wording has been changed to avoid any future legal entanglements with the Clayton Act. It does not in my opinion prevent the Rainier Company from going into the Cellophane business and obtaining their information form a competitor or form 6294 a tie-up with a competitor, particularly in view of our instructions to Dr. Pickens, that we look upon him to protect our interest and to apply his knowledge only for the production of pulp for Cellophane and Rayon work.

"In other words, if Dr. Pickens holds to his agreement and the contract is signed, I still do not see why it is not possible for the Rainier Company to tie-up with Sylvania, for example, and go into the manufacture of Cellophane. I can conceive of a situation whereby we will have told them nothing concerning the manufacture of Cellophane but on the other hand, have steered them to the manufacture of a very satisfactory pulp for Cellophane. In such an instance, they will have lived-up to this contract and yet will be free to tie-up with a competitor in the actual production of Cellophane. You may consider this as far-fetched and may be it is, but I am bringing the point up for consideration.

"I believe the correct thought is well established in your mind and that the wording of Article XV is the most graceful way that we can put it to avoid an entanglement with the Clayton Act. If this thought has been given proper attention in your mind, then I have nothing further to say, other than I think the agreement as a whole is satisfactory."

Here is evidence of an intent to exclude this potential competitor, and it shows that Du Pont even knew it was going to be a violation of the law.

6295 It calls to attention the fact that he feels the very thought of Rainier hooking up with some competitor would be far-fetched, but he just wanted to bring it to their attention and realized that in Article XV that the language was made in that manner in order to circumvent if possible the Clayton Act.

The Government introduces into evidence Government Exhibit 4007 at page 3712, which is a Du Pont memorandum from the Technical Department to the Executive Committee dated September 13, 1930, subject "Agreement—Rainier Pulp & Paper Company and The Du Pont Rayon Company."

(The memorandum from E. K. Gladding, Technical Department, to Executive Committee dated September 13, 1930, was received in evidence and marked, "Government Exhibit No. 4007.")

Mr. Roache. It states:

"I am submitting the latest draft of this agreement as developed by Mr. Farmer and Mr. Higgins for the Rainier Pulp and Paper Company, in cooperation with the Du Pont Company's Legal Department.

"The agreement in its present form is somewhat lengthy and has been made so by the legal minds who have worked upon it, in order to avoid future complications. The agreement is satisfactory to Mr. Higgins, who represents the Rainier Company, meets with the approval of the Du Pont Legal Department and awaits only the approval of our Executive Committee, to be submitted for signatures.

6296 "The agreement is built up on the basis of fairness to both parties and is we believe to the advantage of both parties.

"I call attention to Article XV, the latter part of which is designed to prevent the Rainier Pulp and Paper Company from going into the manufacture of Rayon or Cellophane and without positively so stating. I question the effectiveness of the wording. On the other hand, it is possibly the best wording that will cover the point without possible future complications with the Clayton Act."

Now we come to the agreement.

The Government introduces into evidence Government Exhibit 4008 at page 3713. This is the agreement finally executed as a result of the negotiations just presented by Du Pont and Rainier. I offer the whole exhibit but refer at this time merely to the provision that is pertinent to this part of the case. Later on I will refer to other pertinent provisions. The agreement was executed on the 27th day of September, 1930, and will be referred to as the basic agreement.

(The agreement between Rainier Pulp & Paper Company and Du Pont Rayon Company dated September 27, 1930, was received in evidence and marked, "Government Exhibit No. 4008.")

Mr. Roache. On page 3723 this agreement contains the provision Article XV discussed in the prior exhibits showing intent that this was to exclude Rainier from manufacture of
6297 cellophane.

Article XV reads:

"Restrictions on Use by Pulp Company of Information, Etc., Furnished by Rayon Company

"It is understood and agreed between the parties hereto that much of the information and data furnished hereunder by Rayon Company to Pulp Company is secret information and data of Rayon Company; therefore, in consideration of the disclosure of such information and data by Rayon Company to Pulp Company, Pulp Company agrees that all information and data obtained by it from Rayon Company will be treated as confidential and will not be divulged to anyone, other than officers and employees of Pulp Company; and Pulp Company further agrees for itself, its successors and assigns, that none of the information and/or data obtained hereunder from Rayon Company will be used for any purpose whatsoever other than in the manufacture of pulp."

Now, this is the same provision which Government Exhibit 4007 at page 3712 already in evidence said was designed to prevent Rainier Pulp & Paper Company from going into the manufacture of rayon or cellophane without positively so stating in order to avoid future complications, which Government Exhibit 4446 at page 6208 states as being an entanglement with the Clayton Act.

The Government offers into evidence Government Exhibit 4011, page 3729. This exhibit merely shows that Du Pont exer-
6298 cised its right under Article XIII of the basic agreement to extend for five years the basic agreement. This dated March 18, 1940.

(The letter from F. La Motte, Jr. of E. I. du Pont de Nemours & Company to Mr. Edward M. Mills, President, Rayonier Incorporated, dated March 18, 1940, was received in evidence and marked, "Government Exhibit No. 4011.")

Mr. Roache. The Government introduces into evidence Government Exhibit 4012 on page 3730. This is a letter from Edward Mills, President of Rayonier to Du Pont dated March 19th and acknowledges GX-4011 just introduced, Du Pont's election to exercise their option and extend the basic agreement for five more years.

(The letter from Edward Mills to E. I. du Pont de Nemours & Company attention Mr. LaMotte dated March 19, 1940, was received in evidence and marked, "Government Exhibit No. 4012.")

Mr. Roache. The Government introduces into evidence Government Exhibit 4013 at page 3731. The exhibit merely shows that on October 31, 1937, Rainier Pulp & Paper Company consolidated into and was succeeded by Ranoyier, Incorporated, a Delaware corporation, which succeeded to all the properties, assets and contracts of Rainier Pulp & Paper Company and to all obligations thereof.

6299 (The letter from Rayonier, Inc. to E. I. du Pont de Nemours & Company dated November 8, 1937, was received in evidence and marked, "Government Exhibit No. 4013.")

Mr. Roache. The Government offers into evidence Government Exhibits 4449 at page 6214; 4073 at page 3809; 4074, on page 3810; and 4075 at page 3811.

(The letter from J. E. Hatt to Dr. E. B. Benger dated January 23, 1940, was received in evidence and marked, "Government Exhibit No. 4449.")

(The letter from William L. Hyden to Dr. Russell M. Pickens dated August 20, 1943, was received in evidence and marked, "Government Exhibit No. 4073.")

(The letter from C. M. Switzer to Dr. W. L. Hyden dated May 11, 1944, was received in evidence and marked, "Government Exhibit No. 4074.")

(The letter from William L. Hyden to Dr. R. M. Pickens dated May 16, 1944, was received in evidence and marked, "Government Exhibit No. 4075.")

Mr. Roache. These exhibits are all written by Du Pont officials and introduced to show that although Du Pont had an agreement excluding Rayonier from manufacturing cellophane, it was very careful in its dealings not to give Rayonier any information which would be of value in the manufacture of cellophane in order to make doubly sure that Rayonier would not compete. The exhibits evidence Du Pont's refusal to supply Rayonier with its testing methods and lists of tests which would give Rayonier information on the manufacture of cellophane.

6300 We now come to the discriminatory advantages and concessions acquired by Du Pont under the terms of the agreement which discriminations imposed a competitive disadvantage upon existing and potential competition. Negotiations prior to the agreement established Du Pont's intent to obtain the unusual discounts for its purchases of wood pulp in such a manner as to discriminate against the purchasers of the pulp for use in the manufacture of cellophane and caps and bands.

The Government refers now to Government Exhibit 4066, page 3708, already in evidence, which is an office memorandum from W. H. Farmer dated April 30, 1930, where he stated that after previous general discussion with Mr. Higgins of the law firm of Sullivan & Cromwell respecting a proposal that the Rainier Paper & Pulp Company and the Du Pont Rayon Company enter into contractual relations, the following represents the main features of the proposed agreement.

Then appear the two headings, "Du Pont Rayon Plant Cellophane Contributions" and "Rainier Contributions." Under this last heading appear the proposals that Rainier give Du Pont a better price in its purchase of pulp than it would give to anyone else and a better price than Du Pont could buy pulp suitable for cellophane from anyone else.

I ask your Honor to read especially the whole of paragraph 3. At this time I will quote the second paragraph of paragraph numbered 3:

6301 "In other words, it is figured that Rainier would have to ship from its plant at a published price of $4.00 less than the Riordan shipping point actual price to us." Riordan, I believe, at that time was perhaps the leading wood pulp manufacturer.

I will also read all of paragraph No. 4 on page 3709:

"4. (a). On all pulp Rainier sells to the Comptoir des Textiles Artificiels our company would receive $1.00 per ton royalty. Comptoir estimated 20,000 tons consumption per year might mean a total of $20,000 accruing from this item.

"(b). On Rainier pulp sold to any other customers anywhere a royalty of 50 cents per ton to our company.

As the capacity of the Rainier Company's so called Olympic Plant is planned to be 55,000 tons of wood pulp per year and as the foregoing tentative figures amount to 15,000 tons to Du Pont Rayon Cellophane plus 20,000 tons to the Comptoir, there would be available for 'all others' 20,000 tons at this proposed 50 cents per ton royalty figure or $10,000 maximum."

Paragraph 8 states: "If due to competitive price reduction or other reasons which may cause Rainier to reduce its selling price to other companies sufficiently to eliminate all of the benefit to our company accruing from above provision 3, a new provision will be made to reinstate at least a portion of this eliminated benefit."

6302 The last two paragraphs on page 3710:

"Mr. Higgins offers the above figures as representing to me their first and final proposition, but I am not sure such would be the case if we decline this proposition. I had hoped that we might depend on the equivalent of about $100,000 per year for at least ten years provided the quality of Rainier pulp is sufficiently improved as to be attractive to our companies.

"Personally, I would not be inclined to accept provision 3 (a) as shown. A maximum benefit of $128,500 over 15000 tons equals $8.57 per ton indicated but general price reductions might wipe out all of it. I would include provision that the minimum shall not be less than a certain amount—maybe $2.00—per ton."

Then on page 3711 Mr. Farmer asks for the Executive Committee's criticism.

The Government refers to Government Exhibit 4004 at page 3703, already in evidence. This is a memorandum report from W. H. Farmer to E. K. Gladding, dated May 14, 1930, entitled "Rainier Pulp & Paper Company—Du Pont Rayon and Cellophane Quality Pulp Agreement." It states:

"As a result of my discussion with Mr. Higgins of Sullivan & Cromwell, respecting a proposal that the above two companies enter into contractual relations re the former company's wood pulp production suitable for rayon and cellophane ingredient purposes, following our company's declination to
6303 agree to Mr. Higgins' first proposal covered by my memorandum of the 30th ult., he has now submitted the following rough draft of the Rainier Company's new proposal in its endeavor to eliminate the objections on which the first proposal was declined:

"'The price to DuPont f. o. b. Shelton plant in any month shall not be higher than the lowest price made by Rainier to any other customer f. o. b. Shelton during such month.'"

Skipping paragraph 3, paragraph 4 states:

"'In consideration of DuPont's technical cooperation, the Rainier Company shall pay to DuPont the following amounts:

(a) On all purchases of cellophane or rayon pulp made by DuPont from Rainier, discounts as follows: $3 per ton on all purchases at a price of more than $80 per ton f. o. b. Shelton; $2.50 per ton on all purchases at a price of more than $75 and up to and including $80 per ton f. o. b. Shelton; $2 per ton on all purchases at $75 or less per ton f. o. b. Shelton.

(b) A royalty of $1 per ton on all sales of cellophane or rayon pulp made by Rainier to Comptoir or any other company affiliated with DuPont.

(c) A royalty of $.50 per ton on all other sales of cellophane or rayon pulp made by Rainier.'" Then there follows on page 6304 3704 a discussion of numerous monetary advantages to Du Pont.

Then starting at paragraph 4 on page 3704, I read:

"'Assuming what we all expect and what Rainier must take into consideration in making the proposal, an increase in DuPont's consumption to at least 30,000 tons per year within a very short time, the minimum saving to DuPont below the lowest price of Riordan, or any other competitor, would be at least $75,000 per year in discounts and an additional amount of at least $25,000 in royalties.

"'All of the foregoing estimates are based upon a production by Rainier of only 60,000 tons per year. If DuPont's demand and Rainier's production should increase to the extent that we are both reasonably justified in expecting, the compensation to DuPont in discounts and royalties alone under this arrangement would amount to $150,000 or $200,000 per year, in addition to assuring DuPont the lowest price obtainable for pulp of the required quality.'

"In discussing the foregoing with Mr. Higgins he has agreed the following provisions may be incorporated in the proposed agreement * * *"

Skipping to No. 2, the last paragraph on the page, referring to Mr. Higgins, "He is willing to include in the proposed agreement provision for du Pont purchase of so-called high alpha wood pulp at an even greater discount or concession than is above pro- 6305 vided as effecting so-called standard wood pulp for rayon and cellophane purposes."

Then on page 3705, numbered 6:

"He also agreed that in place of the above (b) and (c) provisions, one provision would be substituted which would provide for a 75-cent per ton royalty on all cellophane or rayon pulp made by Rainier in addition to that purchased by du Pont * * *" In other words, they would get the same amount of royalty because of purchases from others from Rainier as was previously provided. The other provision was $1.00 per ton for that sold to Comptoir and 50 cents sold to others. So this is an in between figure, 75 cents.

I would like to call to your Honor's attention the fact that Rainier does not discuss the contribution Du Pont insists it is making to this agreement; and Du Pont seems to insist on the insertion of the contribution of Dr. Pickens to the employment of

Rainier. Du Pont is considering the fact that Rainier employs one of their former employees as a great contribution. Yet Rainier is paying this man a regular salary.

I refer now to Government Exhibit 4003, at page 3701, already in evidence. This is a memorandum from E. K. Gladding to the Executive Committee dated May 19, 1930, entitled "Rainier Pulp & Paper Company—Du Pont Rayon and Cellophane Quality Pulp Agreement."

It states:

"Attached is Mr. Farmer's report showing the pro-
6306 posed agreement between the Rainier Pulp & Paper Company and the Du Pont Rayon Company, which proposed agreement follows out the suggestion of the Executive Committee as regards a more specific advantage over the lowest price to other purchasers of Rainier pulp.

"I believe the attached proposed agreement is more simple than the one formerly proposed and seems to me to be quite satisfactory. We have much to gain and little to lose by such an agreement. We not only gain a financial advantage due to the contract itself but by abetting competition of this type, we obtain the advantages of a probable general price decline in this raw material."

Skipping over to page 3702, the first paragraph:

"As I view the contract, it protects us against an increase in pulp prices, it gives us the advantage over all other purchasers for use in rayon and Cellophane with additional royalty on all that the Du Pont and affiliated companies use and a royalty on all other pulp used for the rayon and 'Cellophane' industries."

I refer now to Government Exhibit 4001 at page 3698, already in evidence. It is a memorandum from the Executive Committee to E. J. Gladding dated May 22, 1930. The subject is "Rainier Pulp & Paper Company—Proposed Agreement Covering Supplying Us with Quality Wood Pulp."

At paragraphs numbered 2, 3 and 4 we will see the
6307 discriminatory discounts that Du Pont receives:

"2. Definite schedule of discounts applying to high alpha cellulose wood pulp and, if possible, definite indication of differential in price over that of regular pulp;

"3. Provision for option to renew agreement for another 10 year period beyond original 10 year period if we agree to take certain quantity of pulp during the first period;

"4. Payment to us of 75 cents per ton royalty on all sales of Rayon and/or Cellophane pulp by Rainier to other than duPont interests, in preference to royalty of $1.00 per ton on sales to Comptoir and any other company affiliated with duPont and 50 cents per ton on all other sales."

The Government introduces Government Exhibit 4447 at page 6209.

(Extract from minutes of Meeting No. 15, Du Pont Rayon Company, held November 18, 1931, was received in evidence and marked "Government's Exhibit No. 4447.")

Mr. Roache. This exhibit is entitled "Extract from Minutes of Meeting No. 15, Du Pont Rayon Company, held on November 18, 1931."

"Rainier Pulp & Paper Company—Supplement No. 2 to Agreement Covering Their Supplying Us with Wood Pulp.

"Under date of September 27, 1930, we entered into agreement with the Rainier Pulp & Paper Company covering their supplying us with wood pulp. This was supplemented by 6308 agreement, dated March 5, 1931, whereby, in consideration of reduction in selling price to us, we relieved Rainier of obligation under the original contract to equalize its price to us for any delivery of pulp before January 1, 1932, with any lower price on pulp or higher quality delivered by Rainier in Europe before January 1, 1932. It was the feeling of Rainier that in order to introduce its product into the European market lower prices, temporarily, would have to be quoted than in the United States.

"It now develops that owing to exchange differences between European and American currencies, Rainier desire to extend period during which we waive price equalization feature of our original agreement with them. Accordingly, at an informal meeting of the Committee, held on November 13, 1931, action of the President was approved in addressing letter, bearing that date, to Rainier signifying our willingness to co-operate with them to the extent suggested, namely,—

"1. We agree to Rainier selling pulp outside of North America at prices under their North American prices if they see fit, without prejudice to the provisions of our contract with Rainier.

"2. This applies to the 13 months' period beginning December 1, 1931; and results in Rainier allowing us on any deliveries of pulp to us during this period a co-operative discount, for 6309 technical information supplied by us, of $4.00 per ton, instead of the present $2.75 per ton, the latter being based on pulp price of less than $75.00 per ton as stipulated in the original contract."

In this letter, you see Du Pont actually squeezing more discount out of Rainier for agreeing to let them sell in a foreign country which they have a right to sell in anyhow.

Mr. Gesell. It didn't say that at all.

The Court. Recess until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m., of this same day.)

6310 2:15 O'CLOCK, P. M., THE SAME DAY.

Present: As before noted.

Mr. MINICUS. Your Honor will recall that this morning the goat's milk case was interjected into this trial as a precedent or something or other.

The COURT. What case?

Mr. MINICUS. The goat's milk case.

The COURT. Oh, yes.

Mr. MINICUS. I have since learned that the goat's milk case was dismissed in March on the Government's motion without prejudice to reinstate the action. Inasmuch as there is a possibility the suit may be brought again, the reasons for the dismissal are not public knowledge.

I might point out that there are many legitimate reasons for the Department to move to dismiss its own action as there are people in the Department. However, I am authorized to state——

The COURT. There might be more reasons than that.

Mr. MINICUS. I am authorized to state that the fact of presence or absence of substitutes in this case was unequivically not a reason or a motivation for the dismissal of the action.

6311 I am further authorized to report that even after Mr. Gesell's comments with regard thereto Washington is still unconvinced that you could convince a young goat that there is any substitute for its mother's milk.

So that is the situation with regard to the goat's milk case at the present time.

The COURT. I don't think you will need to treat that in your briefs.

Mr. ROACHE. At the conclusion or just prior to the luncheon recess I had just finished introducing exhibits showing Du Pont's intent and insistence on receiving from Rayonier unusual discounts on its purchases of wood pulp.

Now I want to introduce documents showing that the terms of the basic agreement spell out the special discriminatory discounts received by Du Pont from Rayonier.

I refer now to Government Exhibit 4008 on page 3713. This is already in evidence. This is the basic agreement of September 27, 1930, between Du Pont and Rainier.

Article I of the agreement on page 3714 outlines the technical cooperation Du Pont is to give to Rainier. This cooperation is the same type of cooperation that any company would give to another in order to get the best ingredients for its end product. I see nothing unusual in the cooperation Du Pont gives to Rainier.

Article II states that the first step in this cooperation is a release of Dr. Pickens to the employment of Rainier. 6312 I can't see much cooperation there. In the first place, Dr. Pickens wanted to go there.

Article IV on page 3716 outlines the prices and terms of the sulphite pulp to be purchased from Rainier, the maximum price to be paid by Du Pont being the lowest price charged any other purchaser during that particular month.

Article V on page 3717 states that in return for this cooperation Rainier will pay to Du Pont, and I read starting at Sub-paragraph (a):

"On all deliveries of sulphite pulp to Rayon Company, and/or to any of the other companies mentioned in Article III hereof, at a price of Eighty Dollars ($80.00) per ton or more, f. o. b. Shelton, Washington, an amount equal to Three Dollars and Seventy-five cents ($3.75) for each ton of sulphite pulp so delivered;

"(b) On all deliveries of sulphite pulp to Rayon Company, and/or to any of the other companies mentioned in Article III hereof, at a price of Seventy-five Dollars ($75.00) per ton or more, and less than Eighty Dollars ($80.00) per ton, f. o. b. Shelton, Washington, an amount equal to Three Dollars and twenty-five Cents ($3.25) for each ton of sulphite pulp so delivered; and

"(c) On all deliveries of sulphite pulp to Rayon Company, and/or to any of the other companies mentioned in Article III hereof, at prices, less than Seventy-five Dollars ($75.00) per ton, f. o. b. Shelton, Washington, an amount equal to Two Dollars and 6313 Seventy-five Cents ($2.75) for each ton of sulphite pulp so delivered.

"Payments by Pulp Company to Rayon Company of the amounts specified in subparagraphs (a), (b) and (c) of this Article shall be made in cash or its equivalent on the twenty-fifth of each calendar month, and such payments by Pulp Company to Rayon Company shall continue to be made, in accordance with the provisions of this Article, on the twenty-fifth of each calendar month during each year during the life of this agreement.

"It is further understood and agreed that the combined purchases of Rayon Company, and the other companies mentioned in Article III hereof, shall be considered together in determining the payments to be made by Pulp Company to Rayon Company under the provisions of this Article."

6314 The Government introduces into evidence Government Exhibit 4448, page 6210. This is a letter from R. M. Horsey, Director of the Technical Division of Du Pont Development Section to E. A. Yerkes, General Manager, Rayon Department, dated January 10, 1940.

(Letter from Mr. Horsey to Mr. Yerkes dated January 10, 1940, was received in evidence and marked "Government's Exhibit No 4448.")

Mr. Roache. It shows what duPont thinks about its contributions to Rayonier under the basic agreement. I read the first half of page 6210:

"Subject: Rayonier Pulp & Paper Co. Contract.

"At the request of Dr. Benger I am sending you this memorandum for your use in any consideration you feel should be given to the question of renewing the Rayonier contract.

"The effective date of the original Rayonier contract was September 27, 1930. Rayonier had no rayon pulp business before we started to work with them. As a matter of fact, they lacked the data essential to the manufacture of a good quality pulp suitable for rayon manufacture. The original contract states that du Pont represented that it had carried on extensive research work and experiments with respect to the development and improvement of sulphite pulp suitable for rayon and other cellulose products. Dr. Benger states that he believes that representation ex-
6315 aggerated somewhat the amount of development and research work that du Pont had done with pulps for the purposes mentioned.

"Du Pont cooperated with Rayonier by making available one of its technical men who brought to Rayonier a fund of knowledge with regard to pulps from the rayon producer's point of view which undoubtedly meant more to Rayonier than simply the services of one individual and contributed considerably to their success."

This shows that duPont didn't think very much of the assistance that it was supposedly giving Rayonier for all these unusual discounts it was to receive, and Dr. Benger states that the representation was exaggerated.

Mr. Geselle. Well, you didn't read the whole letter.

Mr. Roache. The other two paragraphs mention duPont's release of Dr. Pickens to Rayonier for employment and the fact that duPont helped Rayonier to make a better pulp by making available services and technical help of its own organization.

Paragraph 3 on page 6212 is the recommendation to extend the basic agreement on another five years because of the cooperation duPont gets with Rayonier and the benefits which accrue to duPont from the agreement.

I refer now to Government Exhibit 4011, at page 3729 and 4012 at page 3730, both already in evidence, which are the exhibits showing that the basic agreement was extended on March 18, 1944 another five years. Also Government Exhibit 4013,
6316 page 3731, already in evidence, which shows that Rayonier,

Inc. succeeded to the agreement of Rainier Pulp & Paper Company.

There were certain modification agreements made subsequent to this basic agreement, and these agreements are also probative of the pre-existing agreement that duPont received preferential treatment relative to discounts.

The Government introduces into evidence Government Exhibit 4009 at page 3725.

(Memorandum from W. H. Farmer to The Executive Committee dated February 25, 1931, was received in evidence and marked "Government's Exhibit No. 4009.")

Mr. **Roache.** This is a Du Pont memorandum from the Development Division of the Executive Committee dated February 25, 1931, "Subject: Du Pont Rayon Company Pulp Agreement with Rainier Pulp and Paper Company."

It states:

"The above contract, executed September 27, 1930, provides that our Company shall be permitted to purchase from the Rainier Company a grade of their pulp suitable for use in the manufacture of rayon or cellophane, etc., as cheaply as the Rainier Company sells similar pulp to any other rayon producing company for delivery anywhere in the world. The above price equalization is exclusive of the so-called cooperative agreement additional discounts applied to our equalized price purchases.

6317 "As was not unanticipated by us, the above mentioned agreement provision is becoming embarrassing to the Rainier Company so far as is concerned that company's development of rayon pulp sales to countries exclusive of the United States."

I might add they are talking about rayon pulp sales now, to companies producing rayon, not to companies producing cellophane, and they are going to get a discount for sales to rayon companies.

Mr. **Gesell.** The whole contract relates to that.

Mr. **Roache.** (Reading.)

"A concrete illustration of the above difficulty is now being encountered in the Rainier Company's efforts to introduce its rayon pulp into Europe which we understand is now being supplied to a major extent by Scandanavian pulp at a very low price under highly competitive conditions.

"Believing that if Rainier pulp can once be tried by European rayon producers at any price it could be sold at for that purpose, that it will thereafter be purchased by those same companies at a price differential in favor of Rainier pulp as compared with the Scandanavian pulp, Rainier has secured an opportunity to sell 25,000 tons of its pulp to Europe during the current calendar year.

"In order to make this sale at the necessarily low figure, the Rainier Company asks the Du Pont Rayon Company to suspend the above mentioned price equalizing provision in the 6318 agreement in question between the two companies and, as an inducement for the Rayon Company to agree to such suspension, the Rainier Company offers to reduce by $5.00 per ton the present selling price to our Company of $77.50 per ton for a maximum of 15,000 tons which we would agree would be our maximum of pulp from the Rainier Company for the current calendar year. In other words, the attached copy of the proposed supplement to the existing agreement which would cover the Rainier Company's proposal really fixes the price at which the Du Pont Rayon and Cellophane Companies can purchase from the Rainier Company rayon-quality pulp to a combined total of 15,000 tons, current calendar year, at a fixed price of $72.50 minus $2.75 (cooperative agreement discount) or $69.75 net per ton, f. o. b. Shelton, Washington."

The Government introduces into evidence Government Exhibit 4010, page 3727.

(Agreement between Rainier Pulp & Paper Company and Du Pont Rayon Company dated March 5, 1931, was received in evidence and marked "Government's Exhibit No. 4010.")

Mr. Roache. This is the agreement finally executed giving Du Pont a $5 reduction per ton in its purchase of pulp from Rainier for allowing Rainier to sell for one year in Europe without equalizing its price to Du Pont.

Paragraph No. 1 is the pertinent paragraph showing the reduction of price per ton to Du Pont.

6319 This agreement was signed by L. A. Yerkes, President, Du Pont Rayon, and Edward Mills, President of Rainier Pulp & Paper Company.

The Court. What is the date of that?

Mr. Roache. March 5, 1931.

The Government introduces into evidence Government Exhibit 4017, page 3736.

(Letter from Mr. Mills to Du Pont Rayon Company; attention Mr. Jones, dated May 17, 1932, was received in evidence and marked "Government's Exhibit No. 4017.")

Mr. Roache. This is a modification of the basic agreement of September 27, 1930. It is from Edward M. Mills, President, Rainier Pulp & Paper Company, to Du Pont Rayon Company, dated May 17, 1932.

Paragraph 1 provides for a discount to Du Pont on purchases of cellophane.

Paragraph 2 states that Du Pont will permit Rainier to sell outside of North America at prices under its North American prices.

This modification agreement is to be in force from May 17, 1932 to July 1, 1933.

The Government introduces into evidence Government Exhibit 4014 at page 3732.

(Letter from Mr. Mills to Du Pont Rayon Company, attention Mr. Yerkes, dated July 9, 1934, was received in evidence and marked "Government's Exhibit No. 4014.")

6320 Mr. Roache. This is another supplemental agreement relative to prices to be charged Du Pont based on deliveries on the North American continent. This agreement was signed by Edward Mills, President of Rainier, and L. A. Yerkes, President of Du Pont Rayon Company, dated July 9, 1934.

6321 These discounts that Du Pont received from Rayonier Company were quite excessive. In one year they even exceeded $167,000. I will submit now the actual amounts Du Pont received from Rayonier as discounts under the terms of the basic agreement. These figures were supplied to the Department of Justice by Rayonier, Inc.

I now introduce into evidence Government Exhibit 4451 on page 6222.

Mr. Gesell. I have an objection to that, your Honor, as to authenticity. Somebody in Rayonier wrote Mr. Roache a letter. I press my objection. There is no distinction in these documents at all between cellophane and acetate and cordura yarn or type of wood pulp or rayon purchases. There are no comparisons with anything else and I have to press my objection both as to 4450 and 4451.

Mr. Roache. I think the defense has waived its objection to this by a letter which it sent to plaintiff on January 3, 1951 in which defense counsel stated and listed the companies to which it would object on grounds of authenticity, and the companies are listed, being Sylvania, American Viscose, Celon, and Visking.

Mr. Gesell. That was where we said we would have to have a witness before the document was introduced, but we did not waive any objection at any time as to authenticity of these documents with respect to your producing a witness some
6322 time, and we press the objection, your Honor.

The Court. Unless something can be shown to the contrary, the objection has merit.

Mr. Roache. The Government would like to be allowed to present them later when it puts a witness on the stand.

That, your Honor, concludes the proof of the exclusion of Rayonier from the manufacture of cellophane and caps and bands and of the discriminatory advantage acquired from Rayonier by Du Pont.

I believe that the exhibits speak so eloquently of Rayonier's exclusion and Du Pont's intent to exclude them by means of Article XV of the agreement which was, and I quote from Government Exhibit 4007, "* * * the best wording that will cover the point without possible future complications with the Clayton Act," that a summary of the exclusion of Rayonier is not necessary. It is another manifestation of Du Pont's intent to monopolize.

It is also apparent in the exhibits that Du Pont insisted that Rayonier give to Du Pont unusual and high discounts on all purchases of wood pulp for use in the manufacture of cellophane. This, of course, put Du Pont in a very advantageous position over other manufacturers of cellophane. It was a discrimination against other purchasers of wood pulp for the manufacture of cellophane which Du Pont insisted on. It was a discrimination which Du Pont attempted to justify by so-called 6323 technical assistance to Rayonier. It was assistance, the Government contends, a manufacturer would give to anyone to improve his raw material so that the manufacturer could make a better product.

These discriminations insisted upon by Du Pont, these discriminations in price were not justified and were helpful to Du Pont in being able to manufacture its product cheaper than the other competitors, and thereby aided in the maintenance of its monopoly. A price discrimination induced by Du Pont such as this is in violation of the Clayton Act and is another means by which Du Pont maintained its monopoly.

The COURT. What section of the Act?

Mr. ROACHE. Section 2 (a) and Section 2 (f) of the Clayton Act.

The COURT. Mr. Roache, is that charge in the complaint? Is this a specific violation or are you just mentioning that in passing?

Mr. ROACHE. In the complaint we charge that Du Pont through various restraints of trade, through legal and illegal acts, have maintained their monopoly and intended to monopolize, and this is an illegal act by which Du Pont was able to maintain its position in the industry.

If your Honor would like, I will read that section of the Clayton Act.

The COURT. Oh, no. I can read it. I had no recol-
6324 lection of seeing it.

Mr. ROACHE. We did not specifically mention each and every illegal violation that would come up and we are not charging violations of Section 1 of the Sherman Act or any other act, the Clayton Act; but we are charging a violation of Section 2 of the

Sherman Act, but it was accomplished through various illegal and legal acts.

Mr. Gesell. I have tried to keep patient through this presentation, your Honor, but it has been most difficult. I think the representations with respect to these documents go further than the proof, go further than any representations we have had from the Government so far. Here again we have what I believe the documents clearly show to be a simple, straight-forward business story, and these overtones of unusual discount, preferential treatment, intent, advantageous advantage, and so forth, are not here on the evidence.

In the first place, your Honor, this contract was with one manufacturer of wood pulp, of whom of course there are many. This was a manufacturer who had no experience in making wood pulp either for rayon, for cellophane, or other viscose production.

Document 4448 makes it clear that there was no experience at Rayonier in the rayon and pulp business when Du Pont started to work with Rayonier.

6325 Now, the contract, your Honor, was dated in 1930, and it is perfectly apparent that there had been other suppliers of wood pulp to Du Pont in its manufacturing activities prior to that time, because Du Pont had been in the cellophane business for some years and in the rayon business even longer.

When I got into this case I had the impression that wood pulp would really be hunks of wood with the bark trimmed off that were sent to Du Pont and processed at Du Pont in connection with these various manufacturing operations.

The Court. Incidentally, when did you get into the case?

Mr. Gesell. I have been in the case since the outset, your Honor.

The Court. 1947?

Mr. Gesell. No, since the outset of the investigation.

The Court. I just wondered how many years experience you have had.

Mr. Gesell. I was doing a few other things, too, your Honor. I had the impression that hunks of wood of some kind is what was meant by wood pulp, but actually wood pulp is a processed product which requires many different and complex chemical operations in its production. It must be soluble, it must contain certain types of high alpha or low alpha content, depending upon its purpose. There are many different kinds and 6326 grades. It comes in a highly refined state. It looks like large pieces of thick cardboard, your Honor.

So what was involved here was Du Pont teaching one of many manufacturers of wood pulp the art of making a wood pulp satisfactory for cellophane and more particularly for rayon manufacture.

Under the contract Du Pont made available to Rayonier not only one of its technical men who had been experimenting and working in this field, and who of course took with him, with Du Pont's consent, subject to the restrictions of the contract, substantial technical information, but they were working along, as Exhibit 4448 and others show, with Rayonier in the development of satisfactory types of wood pulp for use either in rayon and/or in cellophane, and of course, your Honor, different types are needed for those two productions, and even different types of wood pulp, depending on the type of product desired.

Now, obviously that raised a question in the minds of people at Du Pont as to whether Rayonier would utilize the information it obtained from Du Pont to go into the cellophane business. There is no indication in these documents and they will be no proof that Rayonier ever desired to go into the cellophane business, ever sought to go into the cellophane business, ever had any notion of departing from its field of activity, wood pulp, any more than
all the other wood pulp companies, none of whom were in-
6327 volved in any arrangements of this kind at all; and the Gov-
ernment has been up through Rayonier just as they have been through Visking time and again talking to their officials, trying to find the proof, and it does not exist. But as a matter of business prudence Du Pont desired to make sure that Rayonier did not use information which it got from it in entering the cellophane
business, a lawful, proper desire on its part.

6328 Most of the documents which were read to the Court today
are documents preceding the exclusion of the agreement, negotiating back and forth on proposals, some emanating from Rainier and some from Du Pont, in which it is quite clear that in the preliminary discussions the business men all said, "We must have a provision that will prevent Rainier from going into the cellophane business because we can't cooperate with them technically unless we do so."

And when the contract came along for the scrutiny of the lawyers, the lawyers said, "That is a limitation which you cannot place in the contract. All you can do is restrict Rainier from going into the business, utilizing Du Pont information." And that is all the contract provided in the provision on page 3723 of Exhibit 4008.

The Court. Read that to me, will you, please.

Mr. Gesell. "It is understood and agreed between the parties hereto that much of the information and data furnished hereunder by Rayon Company to Pulp Company is secret information and data of Rayon Company. Therefore in consideration of the disclosure of such information and data by Rayon Company to Pulp Company, Pulp Company agrees that all information and data

obtained by it from Rayon Company will be treated as confidential and will not be divulged to anyone other than officers and employees of Pulp Company, and Pulp Company further agrees for itself, its successors and assigns—" and this is the pro-
6329 vision, your Honor—"that none of the information and/or data obtained hereunder from Rayon Company will be used for any purpose whatsoever other than the manufacture of pulp."

The Court. Well, what is your understanding of Mr. Roache's statement to the Court—parenthetically, I was not sure I got it correctly—when he said that you cannot have a license of a secret process or trade secret? Do you know of any legal inhibition against that?

Mr. Gesell. No, your Honor. As I understand the Government's position advanced today—and it explains for the first time to me why they found anything illegal even in those initial contracts under which this business got started—it is that if you license someone else under your secret inventions or technical information, the fact that you disclose it to the other in the process of licensing takes away from it its secrecy and therefore you can't license it. And I have understood that from as early as the days of Fowle against Parke on up through the Dr. Miles medical case and until today; there is a clear recognition in the law by the Supreme Court and lower Courts that you may license technical information on restrictions binding the person who receives it to keep it secret or to use it only for specfied purposes. In fact, such contracts, as your Honor knows, are made every day with technical employees, like Dr. Pickens, who work in laboratories of companies and elsewhere on confidential information. I know of no such law.

6330 The Court. That was my understanding, too, because I know instance after instance—at least I wrote an opinion recently wherein I held that equity would protect the confidential relationship growing out of the receipt of such information.

Mr. Gesell. And there are damage suits in court today for the disclosure of it.

The Court. At this time can the Government clear up that point, or did I misunderstand the statement made?

Mr. Minicus. Mr. Roache was attempting to take it beyond that point, your Honor. You can, I suppose, if you divulge your secret information place an inhibition upon the party contracting with you not to disclose it. That is the essence of secret processes. The question now arises, can you put any other restraints upon him, particularly those that would otherwise be restraints of trade?

Your Honor has discussed the old General Electric case. The question came up whether the Line Material case reversed it or weakened it. At least there is a question under patents whether you can restrict in licensing a patent. There is some question in light of the Line Material case whether you can fix the price of resale under a patent. There are a lot of restrictions that were formerly assumed to be all right under patents that were restraints of trade that have considerably been weakened or abolished today.

Now, the issue is, can you by the licensing of a secret
6331 process where there has been no dedication to the public at
all impose upon the licensee of a secret process restrictions that will govern his trade?

The COURT. But, Mr. Minicus, the two proprietary rights, namely, that found in the patent and that found in a secret process are entirely different in nature.

Mr. MINICUS. That is our point, your Honor, and you can't do the same thing with it. You couldn't license a man under a secret process and have him agree only to manufacture and sell in the State of New Jersey, or to sell at a fixed price that you would dictate. If there is any question about those restrictions under a patent licensing agreement, there is no question about them under an agreement to use a secret process, because the situation is so thoroughly different. A patentee does get some privileges that are not permissible under a bare contract because of his dedication to the public. But where there has been no dedication, why should a man in a contract be able to impose these restraints of trade upon the person to whom he is letting use part of this right? There is no franchise under a secret process. The owner of a secret process at the time of his invention has a choice of availing himself of the legal protection of 17 years right to exclude others from manufacturing or selling, or attempting to hold it back so that it never
falls under public domain. Now, if he takes that gamble
6332 and decides to hold that invention as a trade secret, how
can he possibly avail himself of imposing upon that right the further right of restraining the trade of anyone else who he permits to use that secret process. And at what stage does the publication of that secret process cause it to be secret no longer?

The COURT. I know of no case which states it to be the law as you have said. You are arguing by way of analogy?

Mr. MINICUS. That is correct.

The COURT. That is a good argument.

Mr. MINICUS. Thank you, sir.

The COURT. I am sorry for the interruption, but I wanted to get my mind in focus on that problem.

Mr. GESELL. You were right at the point I was on my notes, your Honor. The whole question comes down to whether there is anything wrong today or in 1930 or any other time with a business man who wants to develop his product cooperating with the supplier and exchanging technical information in order to make a better product, cheaper, and of higher quality, without running the risk that the information he reveals when he deals with his supplier is going to be used to set up that supplier in a competing business. Now, I know of no case, I know of no authority patent-wise or trade-secret-wise that prevents that, and it is done every day throughout the country.

The development of this material, your Honor, involved a collaboration that was very extensive in detail, as the
6333 Government is aware from material in its possession, even
to the extent of the construction of pilot plants. And why, when the purpose and objective was to make a better product, cheaper, couldn't this be done? I point out to your Honor that we started out here talking about a fellow who was not in this business at all, and we enabled him to go in the business, Rainier, and as the document says, the more competitive in the wood pulp business. And this is not cornering any supply. Sylvania was free to make an arrangement with a wood pulp man, Celon was free, the other rayon companies were free. We chose to work with this fellow. As a matter of fact, we bought from many people, not just this man, as the Government is aware. And we placed no restriction under this contract upon Rainier supplying Sylvania. Rainier was free to sell to Sylvania or anyone else. We took no royalty on it. They were free to sell abroad to competitors. It is amusing to see, your Honor, that they too have to sell at a little cheaper price to sell abroad, a fact that when it happened in cellophane someone said indicated monopoly.

So here was an arrangement that brought about a better supply to Du Pont and a better supply to others and established a company in a competitive position under a contract approved by the company's counsel and executed in accordance with its terms, and the
President of Rayonier today is Dr. Pickens, the man who
6334 went to that company and brought all this technology and
built the company up.

The COURT. Where is it located?

Mr. GESELL. Rayonier is up in the north of New York State, I believe. It has four plants, I am informed by Mr. McGlothlin, in different parts of the country. Mr. Roache has been there several times. I am sure he knows more detail than I do about it.

The COURT. Where is it, Mr. Roache?

Mr. ROACHE. I don't know of the four plants. I know they have one out in Washington. That was the original plant. Their offices are in New York City, their main office.

The COURT. Where do they get their raw materials?

Mr. Roache. They get most of their wood, I believe, from out in the West, Northwest, and they have also at times imported foreign wood from Scandanavian countries.

Mr. Gesell. Now, your Honor, we have to go one step further. The statement was made, without any proof, and it is not the fact, that this is the same kind of arrangement as Du Pont would make with any wood pulp company. There is no proof of that. And it was said from a reading of the contract that there is nothing unusual about this kind of contract. Well, that isn't proof. It is perfectly clear that valuable information passed to Rayonier, as Exhibit 4448 and others show, and that a better quality of pulp was developed.

Now, what about the discriminatory prices, so-called,
6335 unusually high discounts, preferential treatment? Well,
we took a reduced price back on the wood pulp in payment for the information given rather than a royalty. And that is what that all comes down to. And these purchases that are shown, your Honor, were purchases by the Rayon Company, by the Cordura plants making tires, for acetate, for cellophane, for sponges, and for a whole host of cellulose products, not just cellophane. And the moving party in this arrangement was the Rayon Company. It was a party to the arrangement.

So to read into it an attempt to monopolize cellophane and pull cellophane out is again not to look at the underlying business considerations. And I repeat that there is not a scintilla of proof that this company ever thought about going into the cellophane business, ever wanted to go into the cellophane busines, or that the information we gave them about viscose, your Honor, could have kept them from going in the cellophane business and they wanted to go into the business themselves, because as we said in our own documents, this provision of the contract which is required by the terms of the Clayton Act, as our lawyers tell us, will not be effective in keeping them out if they want to do it.

I guess it goes without saying, your Honor, we don't consider this contract violates the Clayton Act, if that is any sort of issue in this case.

The Court. In other words, you challenge the state-
6336 ment that the events show a violation of 2 (a) and 2 (f) of
the Clayton Act?

Mr. Gesell. Yes. We say that this was not the kind of Act prohibited by those sections, that the price was directly related to the value of the information supplied.

Mr. Roache. As I see the tenor of Mr. Gesell's argument, it is that it goes to the fact that all this was justified. He attempts to justify all these arrangements made with Rainier, the exclusion and the discounts. I submit to the Court that any agreement to exclude another from an industry in the absence of a sale of assets is illegal per se and hence reasonableness is not material.

I would also like to point out, your Honor, that Rainier also agreed not to go into the manufacture of rayon. That was an exclusion from the manufacture of rayon. We didn't want to bring it out because this is a case on cellophane.

Mr. GESELL. It didn't any more agree to that than it agreed not to go into cellophane, your Honor.

Mr. ROACHE. Now, as regard the point he didn't know any law that makes it illegal to have a provision restraining a person from going into manufacture of a product when the person doesn't ever intend to go into it—

Mr. GESELL. That is not what I said.

Mr. ROACHE. ——I refer the Court to U. S. v. General Dyestuffs Corporation, where the Court stated that "Neither
6337 the letter of the law nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist." And if that wasn't the prevention of the birth of a commerce that doesn't exist, I don't know what is.

Mr. GESELL. Well now, your Honor, all we did was to say they couldn't use our viscose secret information in the manufacture of cellophane. We have had it here from Mr. Minicus a hundred times in the case that you can go out and get viscose technology and that there are many rayon companies that have it, and if they got their technology there, decided to enter the cellophane business, they could. And that is why we commented when this went to the Executive Committee that there was no provision that would keep them from going into the cellophane business.

Mr. ROACHE. I come now, your Honor, to the exclusion of the American Viscose Company. I refer the Court to paragraphs 172 through 174 of the trial brief, and to Section IV, No. 1, subhead (d) of the index.

The American Viscose Company, a domestic corporation and a potential competitor during most of the years covered by the complaint because of its leading position in the closely related rayon industry, was excluded from the manufacture and sale of cellophane, and caps and bands through operation of Du Pont's international agreements, described in the cartel
6338 section presented by Mr. Tubridy.

Until 1941 the American Viscose Company was a subsidiary of Courtaulds, Limited, of the United Kingdom. When British Cellophane Limited was created by Courtaulds, it was so created upon the condition that neither Courtaulds nor British Cellophane would compete with Du Pont in its territories, which of course includes the United States. American Viscose, being a subsidiary of Courtaulds, was thereby excluded, and specific mention of the exclusion of American Viscose was made by Du Pont and La Cellophane, which will be brought out in the documents coming. It was made clear in the negotiations leading up to the agreement with newly created British Cellophane Limited that American Viscose would be excluded from engaging in the manufacture and sale of cellophane and caps and bands in the United States. The exhibits now to be introduced will prove this exclusion of the American Viscose Company while it was a subsidiary of Courtaulds.

6339 I refer now to Government Exhibit 1113 at page 1250 already in evidence. This is an extract from the minutes of Meeting No. 32, Board of Directors, Du Pont Cellophane Company, held on January 22, 1932. It reads——.

Mr. GESELL. We have had it read into the record in its entirety once, your Honor.

Mr. ROACHE. It is going in for a different purpose.

Mr. GESELL. Are you going to read these all through again?

Mr. ROACHE. There are parts I think applicable.

The COURT. We have gone over that ground once.

Mr. GESELL. The whole thing was read in by Mr. Tubridy at page 592 of the transcript.

The COURT. You emphasize what you want in it.

Mr. ROACHE. I did not intend to read the documents in their entirety, just specific parts that I want to bring out.

The COURT. Proceed.

Mr. ROACHE. In this one:

"Mr. Albert Blum orally informed the Board that he had recently received advice from La Cellophane, our French Associates, that the latter were negotiating with Cortaulds, Ltd. covering the licensing of Cellophane rights in England."

A hand-written notation at the bottom of the page states, "B. M. M. said he understood the negotiations between La Cellophane and Cortauld's were discontinued with no 6340 agreement reached."

I refer now to Government Exhibit 1112 at page 1248 already in evidence. This is a letter from L. A. Yerkes of Du Pont to Mr. Rene Bernheim, Comptoir des Textiles Artificiels, dated January 26, 1932. The upper right-hand corner shows a copy is going to Albert Blum and John C. Pickard, Foreign Relations Department.

The pertinent part of this letter is the last paragraph on page 1249. I will read that paragraph:

"We are naturally interested in your negotiation with Courtaulds for a possible English plant. From our point of view it would be a very happy solution, with the proviso which you have insisted on in accordance with our contract, that Courtaulds shall not use information obtained from you for a possible English plant to build a similar plant in the United States or Canada. In other words, that Courtaulds shall be excluded from this country and Canada."

I refer to Government Exhibit 1114 at page 1245 already in evidence. This is headed "Cross Reference Sheet." The subject is "Competitors—Cellophane."

"Regarding Rene Bernheim to L. A. Y.," meaning L. A. Yerkes, "date 1/7/32 L. A. Y. reply 1/26/32."

It is a report on a meeting of Sidac, Kalle, Wolff and La Cellophane held on the 5th and 6th of January. I read the last paragraph, page 1245:

6341 "Advised that they (La Celophane) have been approached by Mr. Hambury Williams of Courtaulds, suggesting an agreement for Courtaulds to make Cellophane in England, but of course excluding the manufacture of it by The Viscose Company in U. S. or Canada."

I turn now to the remainder of this exhibit at page 1246, which is a letter from Comptoir des Textiles Artificiels, Paris, to Mr. Yerkes dated January 7, 1932. I read the last paragraph:

"On the other hand, we have been approached by Courtaulds through Mr. Higgins, who is a personal acquaintance of one of Courtaulds directors, Mr. Hambury Williams. Courtaulds wants to negotiate with us to study if an Agreement is possible. We intend to answer this week that we are opened now to study the question. Our intention will be to make a condition i. e. that the American Viscose Company will not make cellophane or moistureproof cellophane in United States, or Canada. This condition has already been expressed to me personally to Mr. Hambury Williams a few weeks ago. I had the impression that Courtaulds would acept this condition for United States . . ."

I introduce into evidence Government Exhibit 4161 at page 3934——

Mr. Gesell. The record will show that that is a partial reading of the last sentence.

Mr. Roache. I will continue the sentence:

6342 "* * * but Mr. Hambury Williams expressed his deception that they would have no share of the Canada market and asked if some agreement cannot be found with Du Pont Cellophane Company."

The Court. Did what?

Mr. Roache. Expressed his deception.

The Court. Deception?

Mr. ROACHE. That is what it says.

The COURT. I don't know what that means.

Mr. GESELL. It is the Frenchman, your Honor, writing.

The COURT. Oh, I see. I am sorry.

Mr. ROACHE. I introduce Government Exhibit 4161 at page 3934. It is a Du Pont memorandum from the Publicity Bureau to J. E. Hatt-Cellophane, dated 6/9/32 and states "Remarks for Your Information." It contains a clipping taken from the Daily News Record. The clipping tells of Courtaulds' attempt to expand in the manufacture of cellophane and the possibilites of the company producing moistureproof cellophane and is introduced merely to show how closely Du Pont was watching Courtaulds' activities.

Mr. GESELL. And not in proof of the facts stated in the newspaper article? Is that my understanding? Because otherwise I will object.

Mr. ROACHE. Just to show that Du Pont was watching closely Courtaulds' activities.

6343 Mr. GESELL. And not in proof of the facts stated in the newspaper article?

The COURT. The Court will not consider the newspaper account as establishing the facts reported therein by the press.

Mr. ROACHE. The Government introduces into evidence Government Exhibit 4452 at page 6223. This is a letter from Norman S. Goetz of the law firm of Proskauer, Rose & Paskus, attorneys, New York City, to Leonard A. Yerkes dated April 27, 1934.

(The letter from Norman S. Goetz to Leonard A. Yerkes dated April 27, 1934, was received in evidence and marked, "Government Exhibit No. 4452.")

Mr. ROACHE. It reads:

"DEAR MR. YERKES: Apropos of our conversation had with Mr. Gillet the other day, I have received from Mr. Gillet's London solicitors the following cable:

"'Reference your cable 24th to Texarti for Bizot Stop Precise Language Proposed Covenants American Viscose Not Yet Discussed Their Solicitors Stop Desire Make That Company Covenant Not Directly or Indirectly Manufacture or Sell or Be Engaged Or Concerned Or Interested In Manufacture or Sale Of Commodity In Question In Any Part of The World Stop Covenant To Be For Benefit of Intended English Company And Our French Clients Stop Presume You Have Copy

6344 (Parenthetical notation omitted from page 3325:)

(Du Pont memorandum from Publicity Bureau to J. E. Hatt—Cellophane, dated 6/9/32 "Remarks for your Information" was received in evidence and marked "Government's Exhibit No. 4161.")

6345 Our Letter 12th Stop Our Cable Address Peregrine London.'

"I await your further word.

"Yours very truly,

NORMAN S. GOETZ."

I call to the Court's attention the fact that Du Pont's contract by which they participated in this world-wide arrangement is with the French clients, which is mentioned in this cable, and a re-reading of the pertinent part of GX-1112, page 1249, the last paragraph, already in evidence, will show how Du Pont fits in this picture. It is a letter from Mr. Yerkes to Comptoirs des Textiles Artificiels, and the pertinent part:

'We are naturally interested in your negotiation with Courtaulds for a possible English plant. From our point of view it would be a very happy solution, with the proviso which you have insisted on in accordance with our contract, that Courtaulds shall not use information obtained from you for a possible English plant to build a similar plant in the United States or Canada. In other words, that Courtaulds shall be excluded from this country and Canada."

The Government offers into evidence Government Exhibit 4453 at page 6224. This is a Du Pont letter from Mr. Yerkes to Mr. W. S. Carpenter, Jr., Vice-President, E. I. du Pont de Nemours & Company, dated May 2, 1934.

(The letter from Mr. Yerkes to Mr. Carpenter, Jr.,
6346 dated May 2, 1934, was received in evidence and marked, "Government's Exhibit No. 4453.")

Mr. ROACHE. It reads:

"I think I told you the other day that Courtaulds and the French Cellophane Company are thinking of going into a joint venture for the manufacture of Cellophane in Great Britain. They have tentatively agreed to protect our position in the United States; and in line with this Mr. Goetz of Proskauer, Rose & Paskus has received the following cable from Mr. Gillet's London solicitors."

That is the same cable I read previously. I won't read it again.

"Would you mind getting the proper person in the Legal Department to pass on this cable and let me know whether they think it covers us both as to language and as to the principle involved? The principal point at issue is whether the covenant should be made by the English Courtaulds Company or whether from a legal or any other aspect we should or could demand a covenant also from Canadian and American companies.

"I have already told Mr. Goetz that we would probably not definitely commit ourselves simply on this cable but would of course have to see the precise language before the final commitment was made.

"It might possibly be advisable for whoever you discuss this with in the Legal Department in Wilmington to talk 6347 personally to Mr. Goetz, as our present knowledge of the whole situation is vague."

The Government introduces into evidence Government Exhibit 4454 at page 6225, a letter from Mr. L. A. Yerkes to Mr. Norman S. Goetz of Proskauer, Rose & Paskus, New York, dated May 25, 1934.

Government's Exhibit 4454

(The letter from L. A. Yerkes to Mr. Norman S. Goetz dated May 25, 1934, was received in evidence and marked, "Government Exhibit No. 4454.")

Mr. Roache. The letter states, and I now read the letter:

"Dear Mr. Goetz: In reply to your letter of April 27th concerning the joint venture of Courtaulds and the French Cellophane Company for the manufacture of Cellophane in Great Britain, we assume that the parties to the venture will see to it that our rights and interests under our contracts concerning Cellophane will be fully protected, and that nothing will be done to interfere with or infringe upon, either directly or indirectly, our rights and interests under our contracts.

"We appreciate your kindness in informing us concerning the matter."

The Government introduces into evidence Government Exhibit 4456 at page 6228. This is a cable sent by Mr. Yerkes to Mr. Gillet, Texarti, Paris, dated New York, June 12, 1934.

6348 (The cable from Yerkes to Gillet dated June 12, 1934, was received in evidence and marked, "Government Exhibit No. 4456.")

Mr. Roache. It reads:

"YOUR LETTER THIRTIETH MAY (stop) OUR LETTER OF MAY TWENTY-FIFTH NINETEEN THIRTY-FOUR TO GOETZ COPY OF WHICH YOU MUST HAVE BY THIS TIME EXPLAINS FULLY OUR POSITION (stop) CANNOT ADD ANYTHING TO IT."

The Government introduces into evidence Government Exhibit 4455 at page 6226. It is a Du Pont letter from Mr. B. M. May to Mr. C. M. Spargo, Legal Department, E. I. Du Pont de Nemours & Company, dated October 18, 1934.

(The letter from B. M. May to C. M. Spargo, dated October 18, 1934, was received in evidence and marked, "Government Exhibit No. 4455.")

Mr. ROACHE. It reads:

"DEAR CLYDE: Enclosed is a copy of our technical agreement with Kalle & Company, a licensee of La Cellophane, which agreement was entered into in accordance with the provisions of the original contract with the French for the formation of Du Pont Cellophane Company.

"La Cellophane and Courtaulds have concluded an agreement for the formation of a British Company which is to have the British Empire, except, of course, that portion which is ours in North America.

"During the past summer we sent to the French, at their 6349 request, a copy of the Kalle agreement which we understood was to be used as a basis of a draft of a technical agreement between Du Pont Cellophane Company and the British Company, a provision for which exists in our contract with the French.

"Enclosed you will also find a draft of the proposed agreement between Du Pont Cellophane Company and British Cellophane Company, which we understand was drawn through the combined efforts of Courtauld's lawyers and those acting for the French. This has been submitted to us by Mr. Hanbury Williams of Courtaulds, who has asked us to signify whether it is satisfactory. Because he is sailing before long he has asked us to let him know next week. He will call upon us again on Thursday, October 25th.

"We are ready to enter a technical agreement with them, but such an agreement must be no more or no less than the one we have with Kalle & Company, in so far as the patent, technical interchange, etc., are concerned. The defining of the territory in this British agreement, however, should be quite precise, especially as regards our territory."

The COURT. What was the date of that document?

Mr. ROACHE. That was October 18, 1934.

(Reading.) "Those British islands, such as Jamaica and the Bahamas, and British Honduras, we have always regarded as our territory. As the 'British Empire' is referred to in the enclosed proposed draft, this may not be so clear, and we 6350 wish it made so.

"The Kalle agreement was drawn in Wilmington and the duPont-Arena agreements are on file there. This proposed British agreement should be in step with both of them. It would probably be well to define the status of our relations with C. I. L., our licensees in Canada and Newfoundland, and providing that C. I. L. as our licensee shall participate in it. I hope the contract with the latter will in no way complicate the matter."

I refer to Government Exhibit 1033 at page 1061 already in evidence. This is a Du Pont memorandum report from L. A. Yerkes, President, Du Pont Cellophane, to the Executive Committee of

E. I. Du Pont de Nemours & Company dated December 3, 1934. I will read the first few paragraphs which show that there was no doubt in anyone's mind that Courtaulds, which also meant American Viscose, because American Viscose was a subsidiary, was restrained from the manufacture and sale of cellophane and caps and bands in the United States.

"In October of this yer Mr. Hanbury-Williams, a Director of Courtaulds, submitted to and discussed with us a proposed technical agreement to be entered into between the new British Cellophane Co. and Du Pont Cellophane Co., provisions for such agreements being contained in the agreement between duPont and the French to undertake the manufacture of 'Cellophane' in our part of the world.

6351 "After reviewing the proposed agreement with the Legal Department and making various alterations therein, we came to an accord with Mr. Hanbury-Williams on the essential points except on the description of our respective territories. The proposed draft as submitted by the British read:

"'For the purposes of this agreement the territory of Du Pont and of the British Company shall be deemed to be as follows, viz:—As to Du Pont North and Central America and as to the British Company the British Empire (which expression includes India, British Dominions and Colonies, but does not include Egypt or any mandated territories) excluding the Dominion of Canada.'

"We told Mr. Hanbury-Williams we could not consent to that description and inserted the following in substitution:

"'For the purposes of this agreement the territory of Du Pont and of the British Company shall be deemed to be as follows:—As to Du Pont North and Central America including any British territory which is a part thereof and including the West Indies. As to the British Company the British Empire (which expression includes India, British Dominions and Colonies but does not include Egypt, any mandated territories or that portion of the British Empire reserved to Du Pont as defined above.'

"In taking our position it was founded upon our belief that Du Pont had acquired 'North America' in the all-inclusive
6352 sense of that description, not only the continental part thereof, but the islands in the Caribbean, the Bahamas and Newfoundland, and all the Central American countries."

The remainder of the report is a discussion of why Mr. Yerkes believes Du Pont's territory included certain British possessions, colonies, and mandated territories. That is not pertinent here.

What is pertinent is although they are arguing about Egypt and mandated territories, there is no argument that they will be excluded from North America; that is, the United States.

The Government offers into evidence Government Exhibit 4474 at page 6259. This is a Du Pont memorandum report from L. A. Yerkes, President, Du Pont Cellophane Company, to the Board of Directors, Du Pont Cellophane Company, Inc., dated April 22, 1935.

(The report from L. A. Yerkes to Board of Directors dated April 22, 1935, was received in evidence and marked, "Government Exhibit No. 4474.")

Mr. Roache. It reads: "Attached hereto is copy of our March Report, dated April 22, 1935, to the Parent Company's Executive Committee, as well as the usual statements covering Assets and Liabilities, Profit and Loss, and Operative Income, as of March 31, 1935.

"In addition to action on appropriation requests as shown in the attached report, the following actions were taken, 6353 subject to your approval, ratification and confirmation * * *"

Skipping down to the middle of the page:

"Technical Agreement with British Cellophane Limited:

"Under date of April 12, 1935, we executed agreement to cover the exchange of technical information, etc., with British Cellophane Limited covering 'manufacture production treatment and operation or use of sheets and films made from viscose'. The term is specified as 20 years from January 1, 1935, and from year to year thereafter unless either party gives notice in writing at least three months prior to end of any calendar year after 1954. Article 10 defines the respective territories of the two parties as follows:

" 'For the purposes of this agreement the territory of Du Pont and of the British Company shall be deemed to be as follows videlicet:— as to Du Pont North and Central America, Philippine Islands and American possessions in the Pacific and any British territory part of North and Central America and all West Indies excepting those islands which are owned by Great Britain and other European countries. As to the British Company the British Empire (which expression includes India British Dominions and Colonies but does not include Egypt any mandated territories or that portion of the British Empire reserved to Du Pont as defined above)'

"Mr. Charles J. Gillet took the agreement back with him 6354 when he sailed on April 13th, and it is expected that we shall receive copy in due course after execution on the part of British Cellophane Limited."

I refer now to Government Exhibit 1109 at page 1229, this is a Du Pont Cellophane Company memorandum from Mr. Hess, Assistant Secretary, to Mr. C. M. Albright, Secretary, dated May 17, 1935.

It reads: "Technical Agreement with British Cellophane Limited. Attached hereto——"

Mr. Gesell. That has been read in toto into the record once. It is a transmittal letter.

Mr. Roache. I will only read the second paragraph:

"Attached hereto is completely executed copy of agreement, entered into with British Cellophane Limited, covering 'manufacture production treatment and operation or use of sheets and films made from viscose'. The agreement bears the date of May 3, 1935, although our Company first executed it under date of April 12, 1935.

"The term of the agreement is specified as 20 years from January 1, 1935, and from year to year thereafter unless either party gives notice in writing at least three months prior to the end of any calendar year after 1954."

Attached to this exhibit and a part thereof is the agreement referred to and the one which restrained American Viscose
from manufacturing and selling cellophane and caps and
6355 bands in the United States. This agreement starts at page
1230 of the bound volume.

I read from the agreement starting at the top of 1230:

"An agreement made the third day of May, One thousand nine hundred thirty-five between Du Pont Cellophane Company, Incorporated, a corporation registered in the State of Delaware, having its principal office in New York, New York State, of the one part and British Cellophane Limited, a Company incorporated under the laws of England and having its registered office at 179 Tottenham Court Road in the County of London (hereinafter called 'the British Company') of the other part * * *"

Mr. Gesell. This agreement was read in toto, your Honor. It is the agreement with British Cellophane. It doesn't cover Courtaulds; Courtaulds isn't mentioned. Do we have to listen to it read again? There is a time when the expense of printing the transcript and Court time and hearing things read and re-read is getting very burdensome on the defense.

The Court. State the purpose of your reference to the document at this time without reading it.

Mr. Roache. This is the agreement referred to and the one which restrained American Viscose from manufacturing and selling cellophane and caps and bands in the United States.

Mr. Gesell. You can't find American Viscose mentioned in the agreement, your Honor.

Mr. Roache. It is true; they are a subsidiary.

6356 Mr. Gesell. Of what?

Mr. Roache. Courtaulds and the French formed the British Cellophane Company. The British Cellophane Company manufactured cellophane and were restrained from manufacturing cellophane in the United States. That makes the relation of American Viscose a subsidiary of Courtaulds and Courtaulds owned part of British Cellophane.

Mr. Minicus. If your Honor please, regardless of whether Mr. Gesell is correct or not about this particular instance of re-reading, I would like to submit that I do not think it was a fair observation to state that we have been re-reading documents constantly. This is the first instance that I know of that we have made any recourse back to documents that have been previously read.

We do feel that here we have a very important illustration of an exclusion of an American company from this field, and the story is undoubtedly devious inasmuch as the story starts here in the United States, goes back to France, through England and back to the United States again. It obviously isn't a simple story, and to point this story up sufficiently with these foreign companies involved in it from whom we had a great deal of trouble getting any information at all—in fact we didn't get any from the foreign companies—it necessitates this reference back to this material at this time.

But I do submit it is the only time that the Govern-
6357 ment indulged itself in that practice and that we have not
run up the costs of the transcript or anything else in that matter. We have considered how we would handle this and there seemed to be no other way to do it than this direct reference to show the detailed and difficult corporate inter-relationships that were operating in this thing.

The Court. Well, let us take this as a guide. Make a valiant effort, when you are going to refer to a document that is already in evidence, to simply call the Court's attention to it and what will be found therein without reading it in toto. I think to read a paragraph to emphasize your point is perfectly legitimate.

Mr. Roache. On page 1234 I will read paragraph 10:

"For the purpose of this agreement the territory of Du Pont and of the British Company shall be deemed to be as follows videlicet: As to Du Pont, North and Central America, Philippine Islands and American possessions in the Pacific and any British territory part of North and Central America and all West Indies excepting those islands which are owned by Great Britain and other European countries. As to the British Company, the British Empire (which expression includes India, British Dominions and Colonies but does not include Egypt, any mandated territories or that portion of the British Empire reserved to Du Pont as defined above)."

It is apparent that that paragraph excludes British
6358 Cellophane Limited from the United States, and as British Cellophane Limited was formed by Courtaulds and French La Cellophane, American Viscose being a subsidiary of Courtaulds, plus the express intent already shown in the exhibits, the American Viscose Company was also restrained from the manufacture and selling of cellophane and caps and bands in the United States, and American Viscose, I might add, never did enter into the manufacture of cellophane until Courtaulds lost control of the company. The American Viscose Company did purchase Sylvania in 1946.

The **Court**. What was the story about Courtaulds losing control of American Viscose? How did that happen?

Mr. **Roache**. That was back in about 1941, and I believe due to the effects of the war the British Company lost its control in the American Viscose Company.

The **Court**. Who took over?

Mr. **Minicus**. That was quite a story, your Honor. I could tell it very briefly.

The British Government wanted to increase their foreign exchange over here, and they ordered the Courtaulds Company to liquidate their foreign holdings, and as part of that deal—in fact, they were directly told they would have to get rid of American Viscose, and a group of bankers here sold the stock to small holdings around this country, and the receipts from it mostly
6359 went to the British Government to support their war effort.

Mr. **Gesell**. That was true of all British company holdings in American investments at that time, your Honor.

Mr. **Roache**. I now refer to Exhibit 1, page 3, which is a covering letter from L. A. Yerkes to Dr. F. Sparre, Director of Development Department. There is a memorandum attached to this covering letter, and the memorandum is from W. W. Richards to F. Sparre, Director, dated February 17, 1944, entitled "Cellophane."

The memorandum is really a history of duPont's participation in the cellophane industry from 1919 to 1944. The part pertinent here appears at page 7 of the bound volumes and it evidences the fact that the agreement, Government Exhibit 1109, was still in effect in 1944.

That is all I have on that, your Honor.

Mr. **Gesell**. If your Honor please, duPont's position is stated in Exhibit 1112, concerning which I have commented before, and Mr. Yerkes' letter to Mr. Goetz, Exhibit 4454, was merely this.

We told the French that they had to live up to their contract with us and they could not let our information be used by British Cellophane, Courtaulds, or anyone else in the United States because we had not licensed it to the French for the United States.

These contracts which have been read are contracts between
Du Pont and British Cellophane, not between Du Pont and
6360 Courtaulds, or Du Pont and American Viscose. They ap-
parently were read, and the statement was made by Government counsel that they imply an agreement by Du Pont that Courtaulds should not come into the United States. The agreement is dated May 3, 1935—I am referring to Government Exhibit 1109.

Five days later Mr. Yerkes suggested to Mr. Gillet that the French sell their stock in Sylvania, which amounted to control, to American Viscose, Exhibit 1116. So there is nothing complicated about it if you look at all the evidence. Five days after the contract we suggested that American Viscose should buy control of Sylvania, and yet the contention is made that we had a complicated insidious undercover deal that can be traced across the Atlantic Ocean and back to keep them out, when they have a document right in evidence where we suggest that we sell them control of the company.

Mr. Minicus. If I may, I would just like to answer that question because I have had that one before me for quite a while, your Honor. However, I would like to begin at the beginning of Mr. Gesell's statement.

He said that this is all justified by the fact of these agreements, and there right in a nutshell we have the trouble with this exchange of all types of technological information across international borders. It is quite obvious that once two gigantic com-
panies in different countries begin to exchange information
6361 of this nature they can't possibly compete with each nor
can their American subsidiaries, which in this case happens to be the American Viscose Company. So American Viscose, the largest producer of rayon in the United States, it is our contention, until Courtaulds had to divest itself of its stock in American Viscose, was foreclosed from this market very directly by these international agreements.

With regard to this letter, and I remember it well, that Mr. Yerkes wrote, if we look at that letter, your Honor—and it is all in the evidence—we will see there is a little bit of a distinction. Here is what the Government maintains happens. There were two American producers of cellophane at that time, with a subsidiary in England of Courtaulds, getting all of this know-how through La Cellophane and other companies who were all in the field, and with American Viscose, a very powerful organization, here, there could be three. The thing to do was to restrain it to two.

The COURT. You say they were getting the information. Were they getting it legitimately?

Mr. MINICUS. Yes. La Cellophane was one of the stockholders in this British Cellophane Limited Company. You see, British Cellophane Limited was incorporated as a result of a joint venture between Courtaulds and La Cellophane. Yes, it was legitimate, if that sort of an international exchange of information is legitimate. That is apparently quite an issue in this case.

6362 The COURT. Well, we will make two assumptions: One assumption is that the agreement, Du Pont-La Cellophane, was legitimate, and then you can make the other assumption that it was not legitimate. But if you give it the benefit of the presumption of legitimacy, then what right had American Viscose to get any information?

Mr. MINICUS. We say that your question answers itself, your Honor. The fact that such a thing could happen to exclude a very powerful and potential competitor in this country cloaks it with illegitimacy, no matter what you hide it behind, whether it be an international exchange of technical information or how you do it, you have got to have these American manufacturers, people here in this country with plant and labor and everything else being able to go into an industry. Once you start to build up these artificial blocks, even if they are the result of international exchanges of information—in other words, your Honor, which is more desirable? Is it more desirable for the French to have the Du Pont information or is it more desirable to have the American Viscose Company free to operate as it thinks best?

Mr. GESELL. The question is what is lawful and what is illegal, not what Mr. Minicus thinks is desirable or undesirable.

6363 Mr. MINICUS. Thank you, sir. Now, I would like to finish.

On this question of this Sylvania-American Viscose-Du Pont deal, we do have this thing. There is no doubt that there was a lot of talk about where American Viscose Company fitted into this picture in 1935 because of this British thing coming in. There were then two producers, with a potential third on the fringe here. What was the suggestion made? Was it, let American Viscose come in and manufacture? Or was the suggestion in that letter that Mr. Gesell spoke about something else? What would have been the result if Mr. Yerkes' advice had been followed at that time? There still would have only been two producers in the United States in cellophane. In other words, it was, let American Viscose buy out this Sylvania stock that is on the market, and then it will be Du Pont and American Viscose, as it is right today, your Honor. Right today that is the situation that they were talking about fifteen years ago. Let American Viscose buy that, and then we have Du Pont and American Viscose; there is no little Sylvania that is independent and small over here. That was the suggestion in Mr. Yerkes' letter—not three manufacturers, but still two, and this time American Viscose and Du Pont.

In other words, I think that all of that evidence that Mr. Gesell was talking about can only be construed in one way:

"We don't want American Viscose in as a third competitor.
6364 But if it is to be American Viscose or Sylvania, let us have American Viscose rather than Sylvania."

Mr. GESELL. Then that is a different charge, not that we would keep them out, but that we would let them in only if there wasn't somebody else here, which shows, your Honor, how much further they ask you to draw inferences without proof.

The COURT. Well, Mr. Roache, do you feel up to starting a new section?

Mr. ROACHE. It is a short one.

The COURT. Let's get along.

Mr. ROACHE. We are now moving up to Paragraph 175 of the trial brief. This is 3 of the index. It is not listed specifically under there, but it falls in that category. It is something we have discovered since that index was made.

Du Pont had signed up the two leading and most important closure manufacturers as exclusive distributors of its cellulose caps and bands. By agreement executed between Du Pont and these independent distributors of cellulose caps and bands, they excluded these independent distributors from engaging in the manufacture of these products.

The defendant, by an agreement executed by and between itself and I. F. Schnier Company, one of Du Pont's distributors of caps and bands, a potential competitor, excluded Schnier from the manufacture of cellulose caps and bands.

The Government introduces into evidence Government Ex-

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6410 Mr. ROACHE. We come now to Paragraph 189 of the trial brief, Index IV, 6 (a).

This next group of exhibits is submitted to show that Du Pont exercised its power to control prices in a manner designed to stifle existing and potential competition. Price re-
6411 ductions were manipulated by Du Pont to discourage entry into the industry by potential competitors and also to suppress existing competitors. This, in fact, was a policy of the Company. I don't contend it was the only reason Du Pont reduced its prices, for there were other reasons of importance policy-wise; but this policy of price reductions aimed at the suppression of

existing potential competition was always present and one of the more important considerations, and oftentimes the main reason for the price reduction.

I refer now to Government Exhibit 1046 at page 1089. This is already in evidence. It is a letter from L. A. Yerkes, President, to Mr. René Bernheim. Comptoir des Textiles Artificiels, Paris, France, dated July 26, 1927.

Mr. Yerkes states in the letter that the Commissioner of Customs has refused their claim of an increase in duty on cellophane and the matter will now have to go through the courts and will probably take from one to two years before they can get an increase in duty. Then he states that the Company has decided to reduce the price of cellophane on September 1st; incidentally, this time before they knew of the refusal.

I would like to read the last two sentences in the second paragraph:

"We do not believe this will keep out all foreign 'Cellophane', but we do believe it will have a deterring effect on importa-
6412 tions. We leave it to you to decide whether to use this information or not."

The Government introduces into evidence Government Exhibit 4489 at page 6280. This is a Du Pont memorandum report from the Cellophane Department to the Executive Committee written by J. E. Hatt, General Manager, dated November 13, 1928, subject "Price Revision."

(The memorandum report from J. E. Hatt to the Executive Committee dated November 13, 1928, was received in evidence and marked, "Government Exhibit No. 4489.")

Mr. ROACHE. It reads: "We shall shortly pass the peak of sales volume for the current calendar year. It seems advisable to further stimulate sales, as we enter the new year, to more closely approximate our maximum production, and to do this, it is deemed advisable to revise prices downward as of November 30th.

"It is proposed to mail the new price lists on Wednesday, November 28th (the day before Thanksgiving) and have it effective on November 30th, together with notice in the hands of all customers and prospective customers, on that date.

"The proposed revision figures a slight fraction under 9% on the ratio of various items to the sales volume in the past three quarters of a year.

"The proposed schedule reduction is shown in the following table:"

Then the schedule is given.

6413 I read the last paragraph:

"This is submitted to the Executive Committee as a matter of information and any comments, criticisms or suggestions are invited. Reductions made at this time are also in line with the policy of reducing the price as conditions permit, to protect ourselves from a competitive viewpoint."

* * * * *

6415 The bulletin to all salesmen dated February 27, 1929, was received (in evidence and marked, "Government Exhibit No. 4491.")

Mr. Roache. It was sent by O. F. Benz, Director of Sales, Du Pont Cellophane Company.

(Reading.) "There is no question but that the last price reduction of November 30th, coupled with the high quality standards and improved service conditions maintained during the past six months, has placed us in a stronger competitive position than ever before!

"In meeting our latest scale of prices, the importers have evidently reduced their margin to such a point that they have to forego entirely some of their former favorite price cutting methods such as 'High Class Seconds,' Free Delivery, Full Case Price on smaller lots, etc., in many instances. With these concessions removed, the value of doing business with the competitor has, in many cases, been eliminated, with the result that a substantial number of accounts have been regained during the past sixty days.

"Bearing this in mind, it will be well for you to immediately develop an up-to-date picture of every phase of the competitive situation in your territory. Do not depend upon the impression of a few months ago, but post yourself on the condition of each account as it is today."

6416 I refer now to Government Exhibit 1451 at page 1935 already in evidence. It is a letter from L. A. Yerkes to Mr. Rene Bernheim, Comptoir des Textiles Artificiels, Paris, dated June 9, 1929.

Mr. Yerkes states that he has Mr. Bernheim's letter regarding the negotiations between Skenandoa and Wolff for the manufacture of transparit. He mentions competition from the foreign company and from Sylvania and states that Du Pont is building a new plant of eight machines and states "We feel that our large output will give us a cheaper cost than our competitor can obtain for several years, and we hope that by consistently lowering our prices we can keep them from expanding too much."

I refer to Government Exhibit 1449 at page 1931 already in evidence. This is a Du Pont letter from F. W. Pickard to Mr. L. A. Yerkes, President, Du Pont Rayon, dated December 19, 1929.

Mr. Pickard reports that he had a talk with Messrs. Gillet and Bernheim and then outlines briefly the subjects covered by them.

One of the subjects was cellophane prices, and he states that Messrs. Gillet and Bernheim were pleased about Du Pont's price reduction of November 30th, as they still maintain that the danger of competition from the building of plants in America is due chiefly to Du Pont maintaining prices at a high level.

6417 I refer now to GX–347 at page 866 already in evidence. It is a Du Pont memorandum report from the Cellophane Department to the Executive Committee dated December 31, 1929, subject "Price Study." This document states that charts showing the detail of the study of the cellophane price situation are submitted and comments are requested relative to the continuation of the present policy on prices. It is also anticipated that a price reduction early in 1930 would be advisable, and discusses how the reductions will be made and that three charts show the various revisions of the present prices is contained in this letter.

* * * * *

6419 (Extract from April 1930 Report of Executive Committee to Board of Directors of Du Pont Cellophane Company, dated May 23, 1930, was received in evidence and marked "Government's Exhibit No. 4487.")

Mr. Roache. This exhibit is dated May 23, 1930 and is entitled "Extract from April 1930 Report of Executive Committee to Board of Directors of Du Pont Cellophane Company."

Going down to the middle of the page, under the heading "Price Revision" I read:

"Plans have been made to reduce the price of Regular Cellophane 5 cents per pound, effective May 26, 1930, and to announce at the same time further reductions in the price of Regular

6420 Cellophane of 5 cents per pound, effective August 1, 1930, and October 1, 1930, respectively."

Then under "Competition" they make the report that they have information that Sylvania is going to start production in the latter part of May.

I refer now to Government Exhibit 4216 at page 4034. This is already in evidence. It is a letter from L. A. Yerkes to Mr. Rene Bernheim.

Mr. Gesell. It is not in evidence. I think you might want to put it in.

Mr. Roache. I am sorry, I thought it was. If it isn't, I hereby offer into evidence Government Exhibit 4216 at page 4034. It is a letter from L. A. Yerkes to Mr. Rene Bernheim, Comptoir des Textiles Artificiels, Paris, dated June 6, 1930.

(Letter from Mr. L. A. Yerkes to Mr. Rene Bernheim dated June 6, 1930, was received in evidence and marked "Government's Exhibit No. 4216.")

I will read the second paragraph:

"You will notice that we have done a rather unusual thing in announcing in advance a price reduction that is to take place in the future, on August 1 and October 1. Our reasons for doing this were principally because of the fact that we had recently heard rumors that Wolff & Co. were again negotiating for an American partnership and we thought it better to let them know
6421 in advance what the price was going to be a few months ahead. We also thought it might have some bearing on anybody else who might be considering the erection of a cellophane plant over here."

I refer now to Government Exhibit 1454 at page 1943, already in evidence. It is a letter from Comptoir des Textiles Artificiels, Paris. The signature is illegible. It is to Mr. L. A. Yerkes, Du Pont Cellophane Company, dated June 16, 1930. In this letter Mr. Yerkes' letter of June 6 to Comptoir is acknowledged and a statement is made that Du Pont's price policy seems to be a clever one in view of the fact that Sylvania will probably start that month to manufacture and in view of the fact that Wolff & Company seem to be negotiating again in the United States.

The Government introduces into evidence Government Exhibit 4492 at page 6284.

(Report from Executive Committee to Board of Directors, Du Pont Cellophane Company, dated July 21, 1930, was received in evidence and marked "Government's Exhibit No. 4492.")

Mr. Roache. This is a report from the Executive Committee of Du Pont Cellophane Company to the Board of Directors, Du Pont Cellophane Company, dated July 21, 1930. It is entitled "June 1930 Report:"

"We attach hereto copy of our June Report, dated July 21, 1930, to the Parent Company's Executive Committee, as well as
6422 the usual statements covering Assets and Liabilities, Profit and Loss, and Operative Income, as of June 30, 1930.

"During the period June 25, 1930, to July 16, 1930, inclusive, there were no specific actions taken by the Committee requiring your approval, ratification and confirmation."

Pages 6285 and 6286 in the attached report to the Parent Company's Executive Committee, just referred to, is from the Executive Committee of the Du Pont Cellophane Company to the Executive Committee of the E. I. duPont de Nemours & Company, dated July 21, 1930, entitled "June 1930 Report." I will start reading on page 6286 at the heading "Price Reductions."

"We mentioned in our April Report, dated May 23, 1930, plans to reduce price of Regular Cellophane 5 cents per pound, effective May 26, 1930, and to announce at the same time further reductions in the price of Regular Cellophane at 5 cents per pound, effective August 1, 1930, and October 1, 1930, respectively. Recently, it was decided to increase the amount of the August 1st reduction on Regular Cellophane from 5 cents to 10 cents per pound, and also reduce the price of Moistureproof Cellophane as of the same date 10 cents per pound, with the intention of carrying out the October 1st further reduction of 5 cents per pound on Regular Cellophane as previously announced. Based on the June sales, the August 1st price reduction averages 8.73% on Moisture-Proof and 13.3% on Regular, or an over-all average reduction of 10.34%.

"Competition:

6423 "We have learned that Sylvania have one machine in operation and expect to have the second start production late in July, although we have not as yet been able to obtain sample of their production. They have stated that they are not yet operating the first machine at full capacity on account of minor quality defects which they anticipate correcting shortly. No evidence of their production of a moisture-proof film has been located, and our information is that they are working on a process which they claim is entirely different from ours, and that it is not intended simply to evade the edges of our Moisture-Proof Cellophane patent.

"The Zeloid Products Corporation, incorporated in May, 1929, for the purpose of producing a transparent cellulose sheeting, issued stock and acquired an old plant of the American Writing Paper Company at Holyoke, Mass. The so-called Hetzel Process was to be used. We have been in touch with Hetzel for the past several years. From what disclosures he would make we have always regarded his process as commercially undeveloped and being more expensive than our own. We have been unable to locate any of their product in the market and are of the opinion none has been offered. There was a recent newspaper article to the effect that the banking house of Austen, Fox & Company were underwriting a $10,000,000 stock issue for Zeloid. We are endeavoring to procure more information."

6424 I refer now to Government Exhibit 467 at page 5943, already in evidence. It is a Du Pont letter from F. G. Hess, Secretary, Executive Committee, to J. E. Hatt, General Manager, Cellophane Department, dated July 2, 1931. It is entitled "Proposed Cellophane Price Revision:

"Executive Committee, July 2, 1931."

In this exhibit Du Pont's price policy is expressed again, and it states that price reductions among other things are aimed at present and potential competition.

Mr. Gesell. It doesn't say "potential."

Mr. Roache. "Future competitive situation," which is potential competition.

Mr. GESELL. They are not necessarily the same thing at all, except possibly to you.

Mr. MINICUS. We will settle for the fact that Du Pont was lowering their prices to keep out future competitive units, too. That is perfectly all right.

The COURT. I don't think Mr. Gesell is going to agree on that subject.

Mr. MINICUS. It is Mr. Gesell's statement, your Honor, not mine.

Mr. GESELL. Do you want to hear what the exhibit says?

The COURT. Yes.

Mr. GESELL. (Reading.)

"The Chairman stated at the meeting of our Board of
6425 Directors, held on June 26th, he had advised the Board that consideration was being given to another reduction in the price of Cellophane, probably around August 1, 1931, in line with our policy in the past, and with due regard for our current return on investment, development of prospective new uses for Cellophane, and the present and future competitive situation."

The COURT. You don't settle with Mr. Minicus.

Mr. GESELL. No.

Mr. MINICUS. I think, your Honor, it is quite clear that one of the factors they were considering in regard to this price reduction was the future competitive situation.

The COURT. What we are discussing is simply a matter of emphasis.

Mr. ROACHE. I introduce into evidence Government Exhibit 4182 at page 3977.

(Letter from L. A. Yerkes to Lammot Du Pont, dated December 3, 1931, was received in evidence and marked "Government's Exhibit No. 4182.")

Mr. ROACHE. This is a letter from L. A. Yerkes to Mr. Lammot Du Pont, President of E. I. du Pont de Nemours & Company, dated December 3, 1931. The upper right-hand corner indicates that a copy went to W. S. Carpenter, Jr. Then under that is the hand-written notation, and I quote, "Sample of transparent paper from Union Carbide and Carbon Company." The letter reads:

6426 "DEAR LAMMOT: Thank you for your letter of the 2nd regarding the Union Carbide Company situation.

"It is encouraging to learn that we probably have a year before they get actively started. Perhaps by that time we can improve our price situation."

I refer now to Government Exhibit 323 at page 835, already in evidence. The letter is from L. A. Yerkes, President, to Mr. W. H. Farmer and Mr. J. E. Hatt, dated March 14, 1933, entitled

"Celon Company." In it Mr. Yerkes states that he would not consider buying Celon out unless at a bargain price. He says it would be much less expensive to put our price down 10 to 20 per cent for a year or two, which would put them out of business. I don't contend they reduced the price to do that, but it shows their state of mind relative to competition.

Mr. **Gesell.** The next sentence says, "Furthermore the Sherman law might possibly come into play here."

Mr. **Roache.** I didn't say they did it. We are showing state of mind.

Mr. **Minicus.** We might add that eventually it did.

Mr. **Gesell.** Not yet.

The **Court.** No comment.

Mr. **Roache.** I refer now to Government Exhibit 1171 at page 1382, already in evidence. This is a letter from J. E. 6427 Hatt, General Manager, Du Pont Cellophane Company, to Mr. W. G. Cuttle, Canadian Industries Limited, Montreal, Canada, dated August 30, 1935. Mr. Hatt is answering a letter from Mr. Cuttle who evidently has asked the Cellophane Company to discuss with Dr. Wallach Sylvania's exports of cellophane to Canada. Mr. Hatt replies that it would be unadvisable to discuss this matter with anyone but Dr. Wallach who at that time was in Europe. He suggested that C. I. L. lower its prices to keep Sylvania's cellophane from coming into Canada.

The **Court.** Would you read me that last part again?

Mr. **Roache.** Well, the letter states——

The **Court.** I just want the reference to C. I. L.

Mr. **Roache.** That C. I. L. lower its prices to keep——

The **Court.** Who said this?

Mr. **Roache.** This is a letter from Mr. Hatt.

The **Court.** Now read me the sentence.

Mr. **Roache.** He suggests that C. I. L. lower its prices to keep Sylvania cellophane from coming into Canada.

The Government introduces into evidence Government Exhibit 4488 at page 6277.

(Document headed "Du Pont Price Policy" dated August 28, 1940, was received in evidence and marked "Government's Exhibit No. 4488.")

Mr. **Roache.** This is a statement of Du Pont's price policy, and at page 6279 is the date August 28, 1940. The part 6428 of this exhibit I wish to read and which shows the policy in 1940 is at page 6278, at the middle of the page, under the heading "To protect our position as a source of supply." I read:

"We try to maintain up-to-date economic analyses of processes available to the Company and to others for the manufacture of our products, in order that we may be assured of the lowest cost and highest quality of product. Guided in part by these economic analyses, we endeavor through quality, service and price to maintain our position against the existing or potential competition of other sellers, and to protect the Company's investment by making it attractice for consumers * * *"

I believe, your Honor, that these exhibits just introduced have established Du Pont's price policy which it actually carried out, and it was a policy of consistent price reductions aimed, among other things, to suppress competition and to stifle and make a tremendous obstacle to those contemplating the manufacture of cellophane.

This policy of reducing prices aimed at existing and potential competition was not always the prime factor, but it was always a prime factor and in several instances was the major and principal reason for the price reduction, and this shows Du Pont's intent by this attempt to stifle competition to maintain its monopoly—in other words, intent to monopolize.

Mr. GESELL. We don't hear much about the public in 6429 this kind of a discussion, your Honor, how they were benefitted by lower prices and better quality and more goods, and I had thought that the Sherman Act was a consumer statute, and I had thought that one of the purposes of the Sherman Act was to bring about price competition. And I am sure that if it is an offense for a business man to have in his mind when he reduces prices that it has some competitive significance and business concerns are to stand indicted under the Sherman Act for having evil thoughts because they thought about the competitive effect of a reduction in price, then everyone who does business in the United States is guilty, because I ask your Honor, how can anyone engage in business and think about the price he is going to charge for his goods if it is a competitive economy without thinking about its competitive effect? And as this price went down and down and the volume went up and up and the quality improved and more and more people bought it, new uses were developed, impetus was given to such broad things as the chain store, the consumer didn't complain, and the public wasn't hurt.

Now, I have discussed every one of these documents practically before. So I am not going to go over them again, but I think I should make clear to your Honor the basic points which we have emphasized in the case as we have gone along. I pointed out to your Honor again and again, and it has never been controverted by the Government, that not a single one of these price re- 6430 ductions was made below the point of cost plus a reasonable return. This was no monopolist cutting below cost to drive somebody out.

The second thing that I have emphasized is that there were no jiggles, your Honor, no shaking down of the price in a particular market or as to a particular customer or for a particular period of time and having accomplished an anti-competitive effect putting the price up again. These price reductions were made and the curve was consistently downward until slight reductions after the war in the inflation period that followed.

Take this one instance of an advance price announcement which the Government comes back to and back to. Not only did we make the reductions that we said we were going to make to give an indication among other things to the trade as to what we thought the price should be, but in point of fact, our price reductions were in excess of the ones we had announced in advance.

I simply want to read two excerpts from these documents which in our judgment summarize it. The first is from 347 at page 869:

"The reasons for consideration of proposed price revision at this time are largely the attempt to open up new and large markets on possible units of lower priced commodities and also the present and prospective competitive situation not only as regards other manufacturers of a material similar to cellophane but also in-
6431 cluding the recent improvements in glassine." which all this
time was selling below cellophane, and which we were hoping to displace. And if we brought our price down so we could compete within permissible limits and we realize that we could compete better with glassine or one of these other materials, I see nothing wrong in that at all.

Now, as to 4488, here is a portion of the price policy that wasn't read:

"In conformity with its general policy, the company endeavors to increase consumption of its patented and other new products by aiming at a low profit per unit on a large volume of sales rather than a high margin on a small volume."

Mr. Roache. With reference to that last statement, your Honor, only a monopolist has that power.

The Court. Well, tell me this, Mr. Roache. Is it your theory that the weaker competitor should pace the price?

Mr. Roache. No. What we want is that there are to be competitors so that the price will not be set by the monopolist. Du Pont had the power to set this price at any figure it wished. A competitive situation would have brought about a difference——

The Court. Suppose they did not reduce the price, they would still be in Court today under your theory, wouldn't they?

Mr. Roache. Competition may have been able to come in then.

6432 The Court. But they would have been in Court today whether they would have lowered the price or not?

Mr. ROACHE. If they monopolized, they would be in Court today. That is what we are talking about.

The COURT. Then why bother so much about a discussion as to price which seems to be irrelevant under your theory?

Mr. ROACHE. This is to show their intent to maintain that monopoly. That is why I put it in there. These are instances to show what Du Pont did to keep that monopoly, when a competitor would come in; the various things they did.

Mr. MINICUS. Not only that, but may I say that every Court that has ever decided the subject of monopoly has held the power to fix the price as one of the leading indicia of the monopoly power.

The COURT. Are you going to enter a new subject now?

Mr. ROACHE. This would be an appropriate time for a mid-morning recess.

The COURT. That is what I was going to suggest.

(At this point a short recess was taken.)

6433 Mr. ROACHE. We are now at Paragraph 191 of the trial brief and the Index IV, 5 and 3, sub-section (a).

At this paragraph in the trial brief the Government contends that Du Pont utilized its industrial power and prestige in its relations and negotiations with the Union Carbide & Carbon Company. The exhibits I will introduce into evidence will show that with the intent to keep this potential competitor from manufacturing cellophane Du Pont broughts its prestige and power into play to discourage Union Carbide & Carbon Company, one of the largest chemical companies in the United States, from manufacturing a product that Du Pont believed to be cellophane.

The Government introduces into evidence Government Exhibit 4173 at page 3966. This is a Du Pont letter from L. A. Yerkes, President, Du Pont Cellophane Company to E. K. Gladding, General Manager, Technical Department, dated November 10, 1931.

Mr. GESELL. May I interject, your Honor, to focus this issue before we get into the reading of the documents?

Is it the Government's contention that Union Carbide & Carbon Company was considering the manufacture of cellophane?

Mr. ROACHE. That is right.

Mr. GESELL. Cellophane?

Mr. ROACHE. Well, they claimed it was not, but Du Pont said it was.

Mr. GESELL. My question is, Is it the Government's
6434 contention that Union Carbide & Carbon Company was considering the manufacture of cellophane?

Mr. ROACHE. It is the Government's contention that Union Carbide & Carbon was considering the manufacture of a product Du Pont thought was cellophane.

Mr. Gesell. But that it was not cellophane, you acknowledge?

Mr. Roache. I don't know. That is my statement.

The Court. Did Union Carbide & Carbon Company have a bona fide and valid intention or plan or consideration of any kind to enter the cellophane field?

Mr. Roache. That is right.

The Court. They did?

Mr. Roache. To sell a transparent sheeting that Du Pont thought was cellophane.

Mr. Minicus. Your Honor, may I focus the issue, please? As long as it is a matter of intent here it doesn't make any difference what the product was.

The Court. I am not interested in intent at this moment; I am interested in an answer to the simple question: Is it the master fact, is it the basic fact that Union Carbide planned to enter the cellophane field? They did or they did not.

Mr. Minicus. Not cellophane.

The Court. They did not?

6435 Mr. Gesell. My point is simply this, your Honor: Here is a case offered to show relation with Union Carbide & Carbon Company not involving the manufacture of cellophane, but involving the manufacture of one of these other flexible films.

Mr. Minicus. The answer to that——

Pardon me, go ahead. I thought you were finished.

Mr. Gesell. What I am anxious to do is focus where that stands under your Honor's ruling as to these other materials.

Mr. Minicus. The answer to that, I believe, your Honor, is this: As we tried to point out, Du Pont did not know what this product was that the Union Carbide was about to manufacture, and the documents will show they thought it was cellophane. That is the important fact. It turned out in the end that it was a product closely related to cellophane but it was not cellophane; but Du Pont at the time of these negotiations and transactions thought that Union Carbide & Carbon was going into the manufacture of cellophane.

The Court. Proceed. I want to see what the evidence shows.

(The letter from L. A. Yerkes to E. K. Gladding dated November 10, 1931, was received in evidence and marked, "Government Exhibit No. 4173.")

Mr. Roache. It reads:

6436 "Enclosed is a sample of a new competitor of Cellophane, which we understand is about ready to be put on the market. It is apparently regular and not moistureproof.

"Will you please have this analyzed and let me know whether it is acetate, viscose, or what-not?

"I haven't been able to get much information except that either ethylene glycol or ethylene oxide is used in its manufacture. Does this mean anything to you?

"If the sample is big enough to have any physical tests made on it, please have them made also."

The Government introduces into evidence Government Exhibit 4174 at page 3967, a memorandum in reply to the preceding letter. It is from E. K. Gladding to Mr. L. A. Yerkes, President, dated November 16, 1931.

(The letter from E. K. Gladding to Mr. L. A. Yerkes dated November 16, 1931, was received in evidence and marked, "Government Exhibit No. 4174.")

Mr. ROACHE. He states:

"On November 10th you wrote regarding a sample of a new competitor of Cellophane and attached the small sample to your letter. We have analyzed this sample as best we could, but you realize that on account of the size of the sample, it was impossible to do very much on it.

"However we find that is a regenerated cellulose Cellophane softened with 16.4% of water-soluble softener, which is easily
6437 oxidizable and might well be ethylene glycol. The amount
of the sample is too small to definitely state this; we feel confident, however, it is not glycerin."

There appears in the middle of the page a comparison between the sample and Du Pont's regular cellophane.

The last paragraph states:

"The sample seems to be a very good Cellophane, probably a little bit stretched during the drying operation, that is, overstretched in comparison with ours. If you can get a larger sample of this material, we can give you a better picture of exactly what it is."

The Government introduces into evidence Government Exhibit 4175 at page 3968. It is a letter from F. A. Wardenburg, General Manager, Ammonia Department of the Du Pont Company to L. A. Yerkes, President, Du Pont Rayon Company, dated November 16, 1931.

(The letter from F. A. Wardenburg to Mr. L. A. Yerkes dated November 16, 1931, was received in evidence and marked, "Government Exhibit No. 4175.")

Mr. ROACHE. (Reading.)

"DEAR SIR: After you told me that you had heard the Carbide and Carbon Chemicals Corporation had a cellophane machine I had inquiries made from Mr. Cheetham, who writes to Mr. Clough as follows:

"'I have not heard any mention of the fact that Carbide

6438 had built a plant or were contemplating building a plant for the manufacture of cellophane. I have made inquiries from our technical men around here who are in contact with the technical men in South Charleston, and none of them have heard anything about this matter.

"'I have a contact which I will follow up which will be some time during the following week and if I hear anything definite at that time, I will let you know.'"

The Government introduces into evidence Government Exhibit 4176 at page 3969. It is a letter from L. A. Yerkes to F. A. Wardenburg, General Manager, Ammonia Department, dated November 19, 1931.

(The letter from L. A. Yerkes to F. A. Wardenburg dated November 19, 1931, was received in evidence and marked, "Government Exhibit No. 4176.")

Mr. Roache. In this letter Mr. Yerkes thanks Mr. Wardenburg for his letter and asks that the information he had previously given—he adds that the information he had previously given was premature and that they, meaning Union Carbide & Carbon Company, had nothing more than a very small laboratory machine. However, it would be well for Mr. Clough to keep his eyes and ears open.

The Government introduces into evidence Government Exhibit 4381 at page 3970. I would like to call your Honor's special attention to this exhibit. It is a letter from LaMotte du Pont, President of E. I. du Pont de Nemours & Company, to Mr. 6439 L. A. Yerkes, President, Du Pont Cellophane Company, dated December 2, 1931.

(The letter from LaMotte du Pont to L. A. Yerkes dated December 2, 1931, was received in evidence and marked, "Government Exhibit No. 4381.")

Mr. Roache. (Reading.)

"Dear Len: Yesterday I called on Mr. Jesse Ricks of the Union Carbide & Carbon Corporation, and had about an hour's talk with him and Mr. Barrett, regarding their proposed entry into the cellophane field.

"They stated that they have purchased from the inventor, who was formerly connected with the Wisconsin State University at Madison, rights to his process for the manufacture of a transparent wrapping material similar to cellophane.

"The contract gives them the option of investigating for a year and then, if satisfactory, making some form of additional payment. I gather that even this is not the final payment, and they have further time for investigation.

"The process is said to be new, different from other known processes and covered by a patent application. The process is said to be cheaper than other processes and produces an equally good article, including being moisture proof.

"So far, the work has been entirely laboratory work; and the sample given Mr. Richter was from the laboratory. They have not built any plant and do not intend to build any plant
6440 until they have made a thorough investigation, and it was intimated that we would hear further from them before they would undertake to build a plant.

"They assured me repeatedly they did not wish to rush into anything, most of all a competitive situation with du Pont. Their whole tone was most agreeable and, put briefly, their position was that they thought they had an opporunity to acquire something good and had simply taken the steps to make a careful investigation.

"In the course of the conversation, various efforts at co-operation between Carbide and du Pont were referred to, and in every case assurances of their desire to work together, given.

"I could not take exception to their stated position in any respect, but explained to them thoroughly our position with respect to patent rights, competition and prices, stating that we believed we have a moisture-proof product, adequately covered by patents, and that with or without competition, we intended to keep the price of the product reasonable as compared with manufacturing costs."

I refer to Government Exhibit 4182 at page 3977 already in evidence, a letter from Mr. L. A. Yerkes to Mr. LaMotte du Pont dated December 3, 1931. It states that inasmuch as they have a year relative to the Carbide situation perhaps they can improve their price situation.

6441 I introduce into evidence Government Exhibit 4178 at page 3972, a letter from Ernest B. Benger, Assistant Director of the Chemicals Department of Du Pont, the parent company, to Mr. L. A. Yerkes, President, Du Pont Rayon Company, dated January 5, 1932.

(The letter from Ernest B. Benger to L. A. Yerkes dated January 5, 1932, was received in evidence and marked, "Government Exhibit No. 4178.")

Mr. Roache. It reads:

"Dr. J. G. Davidson, General Sales Manager of Carbide & Carbon Chemicals Corporation, came in to see Dr. Bolton this morning and, among other things, touched upon the subject of Moisture-proof Cellophane. I believe the information which came to Mr. Richter on this subject was passed on to you and you may have since developed all of the information which Dr. Davidson gave to Dr. Bolton this morning and perhaps a good deal more, but I am passing on what Dr. Bolton gave me for any interest that it may have to you.

"Dr. Davidson stated that the Carbide people are considering the building of a plant but that up to this time their studies have not gotten to a large scale. The process was purchased from the Burgess Laboratories of Madison, Wis., as a result of a Carbide representative happening to see Mr. Burgess or some representative at a time when they were more or less shopping around with this imitation Cellophane development.

6442 "Dr. Bolton got no information whatever as to the nature of the material other than the statement from Dr. Davidson that it was not a regenerated cellulose product. Dr. Davidson told Dr. Bolton that they believed their product would be considerably cheaper than Moistureproof Cellophane and that it might also be superior. The figure of 25¢ was mentioned by Dr. Davidson as a possible low cost for Moistureproof Cellophane and the impression was given that their material could be produced for less than this.

"Quite aside from the above, Dr. Davidson said that he understood we were getting ready to sue Sylvania and that Sylvania felt very comfortable in the matter and were confident of defending themselves."

The Government introduces into evidence Government Exhibit 4179 at page 3973. It is a letter from L. A. Yerkes to Dr. Ernest B. Benger, General Assistant Director, Chemical Department of Du Pont parent company, dated January 7, 1932.

(The letter from L. A. Yerkes to Ernest B. Benger dated January 7, 1932, was received in evidence and marked, "Government Exhibit No. 4179.")

Mr. Roache. In here he states that he was glad to get his letter relative to the talk with Dr. Davidson and that such information is always welcome. However, their tests show that the Carbide product is regenerated cellulose.

The Government introduces into evidence Government 6443 Exhibit 4180 at page 3974. This is a letter from E. K. Gladding, General Manager, Technical Department of Du Pont, to E. K. Bolton, Chemical Director, dated January 22, 1932.

(The letter from E. K. Gladding to Dr. E. K. Bolton dated January 12, 1932, was received in evidence and marked, "Government Exhibit No. 4180.")

Mr. Roache. This exhibit contains Mr. Gladding's answer to Mr. Yerkes' request for all information on the sample of cellophane that was manufactured by Carbide & Carbon Company. Mr. Gladding in this letter comes to the conclusion that the only difference between the sample and regular cellophane was in the softener used.

The Government introduces into evidence Government Exhibit 4181 at page 3975. This is a letter from E. K. Bolton, Chemical Director, to Mr. L. A. Yerkes, President, Du Pont Rayon Company, dated January 18, 1932.

(The letter from E. K. Bolton to L. A. Yerkes dated January 18, 1932, was received in evidence and marked, "Government Exhibit No. 4181.")

Mr. ROACHE. (Reading.) "On January 15th I called on Dr. J. G. Davidson, General Sales Manager of the Carbide & Carbon Chemicals Corporation. During the course of the conversation I brought up the question of Cellophane. He said that they had thought they had received the information on very good authority that Sylvania had been 20% and 25% of the Cellophane
6444 business. He had made the statement on a visit to Wilmington, which Dr. Benger reported to you on January 5th, that Sylvania felt quite confident of their patent situation. I told Dr. Davidson that I thought Sylvania, or any other company that tried to manufacture Cellophane, would be in difficulty with many patents in view of the long time that we have been working on Cellophane and the amount of work which has been done, not only to strengthen the position with regard to Cellophane but to build up a defensive patent situation as well.

"Referring to the activities of the C. & C. Corporation in the manufacture of Cellophane-like material, he said that at the present time they are making a very careful examination of their patent situation. They have demonstrated previously that the process is technically all right. Before they make any decision to enter the business, it is their plan to discuss their position with the officials of the duPont Company, explaining exactly what they are proposing to do and what their marketing policies would be. According to their present ideas, they would be content to be a minor factor in the field and would probably not desire more than 30% of the business. They believe that there is no other company that could enter this business under such favorable conditions as the C. & C. on account of the use of materials which they are now manufacturing on a very large scale. If the duPont Company has any patents that will conflict with the operation of their
6445 process, Dr. Davidson said he thought they would probably desire to take out a license.

"Dr. Benger has reported a previous conversation held with Dr. Davidson in which he said that their new material was not a regenerated cellulose. I asked the same question again and explained to Dr. Davidson what regenerated cellulose was and how Cellophane made from regenerated cellulose was different from cellulose acetate. He re-affirmed his previous statement that their material was not a regenerated cellulose. Dr. Davidson showed me a sample of their material, which you have also had. This particular sample had very good color and clarity but showed a certain number of striations. The product was also odorless. He said that at the present time it is as good, if not better in certain respects, than moisture-proof Cellophane although he recognized that the moisture-proof Cellophane that we are manufacturing is only a temporary standard and can be improved as desired. He did not volunteer to give me a sample. I was also not able to get any information about the extent to which they might improve their product which might become a point of some importance in the future, if they decide to go into this business.

"Mr. Richter told me, after his conversation with Mr. Rafferty, that the subject of ethylene oxide came up several times in his conversation. I also have the vague impression that Dr. Has-
6446 kins has reported the presence of diethylene glycol in this
product. From the information that has come to our attention, at the present time it seems as if the best guess might be an oxy ethyl ether cellulose made by the action of ethylene oxide on cellulose or sodium cellulose. I believe that the I. G. has already patented this reaction and this patent may cause some embarrassment to C. & C. As you know, ethylene oxide can be manufactured very cheaply on a very large scale by C. & C. I would be very glad if Mr. Gladding would send to me whatever information he has on the sample of Cellophane which Mr. Richter obtained from Mr. Rafferty and turned over to you.

"You are probably familiar with all of this information but I am passing it on to you for what it may be worth."

6447 The Government introduces into evidence Government Exhibit 4475 at page 6260.

(Letter from Hamilton Bradshaw to L. A. Yerkes dated August 2, 1932, was received in evidence and marked "Government's Exhibit No. 4475.")

Mr. Roache. This is a Du Pont letter from Hamilton Bradshaw, Assistant Director, to L. A. Yerkes, President, Du Pont Rayon Company, dated August 2, 1932. It reads:

"Dr. Bolton has suggested that we should write you briefly about a new cellulose product which has recently been called to our attention and which may be of interest to the Cellophane Company: I refer to glycol-cellulose. A letter recently came from Dr. R. L. Kramer of the London Office, telling us about I. C. I.'s interest in this product as a possible competitor of Cellophane. A copy of that letter went to Mr. Farmer and since that time we have corresponded on the subject with Mr. Gladding. Glycol cellulose is made by the reaction of ethylene oxide with

alkali cellulose and the particular type of product which is of interest in this connection contains a very small amount of the hydroxy ethyl group which is thus introduced. The low-substituted product is not soluble in water but is soluable in 6% alkali at low temperature and the solution is stable when the temperature is raised. Such a solution can be used for the regeneration of a glycol cellulose film similar to the sample which I am en-
6448 closing, which was made from cotton linters. The patent situation on this material is very complicated but we have a suspicion that it is the product in which Carbide & Carbon are interested. There is a 1924 patent to Dreyfus which contains broad product claims on glycol cellulose. There is also a 1929 patent to Lilienfeld which contains narrower product claims on the particular type of glycol cellulose which is insoluble in water but soluble in dilute alkali. A patent to Schorger, issued in June of this year, covers in great detail the preferred process of manufacture, which involves the reaction of ethylene oxide with alkali cellulose. Schorger's work was done for the Burgess Laboratories, but we have information of so degree of reliability that it was offered to Carbide and Carbon Chemicals Corporation by the Burgess Laboratories. Presumably, in order that Carbide & Carbon could manufacture this product, they would have to get control of the Dreyfus and Lilienfeld patents as well, and we know nothing about that situation. In connection with the Carbide & Carbon phase of the matter, you may wish to refer to Dr. Bolton's letter to you of January 18, 1932.

"We are making a brief investigation of this material at the Station and are extending our investigation also to other low-substituted products of cellulose which might be of similar interest. We are, of course, cooperating with Buffalo in this matter and are keeping them informed about the results of our work."

6449 This letter indicates, your Honor, that they have discovered now that it really was not cellophane. The point I want to bring out is that in the letter of December 2, 1931, Lammot Du Pont had a conference with Jesse Ricks, Chairman of Carbide & Carbon Company, and Mr. Barrett, in which he discussed the whole situation with him and outlined to Carbide & Carbon Du Pont's patent situation, intimating that they would run into trouble and that they had better not come into this field. Carbide & Carbon said, well, they would investigate it and be sure they would not do anything without first consulting the Du Pont Company.

This was introduced, your Honor, to show the intent again of the Du Pont Company to keep oth[illegible]s out, their desire and their overt actions to keep other people out of this industry so that they could maintain their monopoly. It again shows their intent to monopolize.

Mr. GESELL. On the presentation of the documents that have been offered, your Honor, I have no comments, but I must say to your Honor in all seriousness that the Government has in its possession documents that show a long chain of events after this, experimentation, cooperation with Union Carbide, testing the relative merits, a refusal to buy up their products, a setting of them free to go their own way, their efforts to peddle their product to Goodyear, to Industrial Rayon, to Sylvania, and many others, nobody taking it up.

6450 On this presentation I simply want to put a caveat in the record, your Honor, but there has not been a fair and complete presentation of the evidence for whatever it is worth.

Mr. MINICUS. Your Honor, we have taken this situation from the time that Du Pont discovered that this second largest manufacturer in the chemical industry had something that they very definitely thought was cellophane. We have carried that along step by step, showed their concern, showed their investigation, their direct contacts through Mr. Lammot Du Pont with this potential competitor, and we carried it through the final document to the point where it was established that it was glycol cellulose. At that point it became another product. Our evidence beyond that point is no good, is not admissible under your Honor's ruling for one thing. The second thing is, there is no point to it, it is no longer in the field of cellophane. We were only interested in Du Pont's activities with regard to this material as long as they continued thinking it was a product of regenerated cellulose. Once they found out, as that last letter disclosed, that it wasn't regenerated cellulose, it is not material for the purpose of this case.

The COURT. Only insofar as it might clarify what their original intention was.

Mr. GESELL. Precisely.

The COURT. I do not know whether it would or not be-
6451 cause I have not seen the evidence, but that is the only point of discussion.

Mr. MINICUS. We do not believe it would. What happened after they discovered it was not cellophane is a different matter entirely. The documents are there and we have turned them over to the defendant. This time I do not think we are taking advantage of the situation by saying that if the defendant thinks that that is material, they have our documents for their own defense in refutation of the point we have made here. But we do not think it is material. Therefore we do not desire to offer those documents at this time. If we go beyond that, in the first place, we will be proving matters that we consider immaterial, we will be flying in the face of your Honor's order. We have no reason not to: we don't believe there is anything in those documents detrimental to the Government's case, but we feel that once the Du Pont Company definitely learned through their own experiments that this product was not cellophane and were convinced it was not cellophane, then their relationship with Carbide & Carbon was in another field. But while they thought it was cellophane and while they were going back and forth, then we say that it has a bearing on their intent within this field. That is why we stopped the documents when we did, your Honor.

Mr. ROACHE. Next among the devices that the defendant resorted to to suppress existing competition and to prevent the possible new competition was the obtaining of an increase
6452 in the duty for cellophane by actions before governmental tariff tribunals. This had the effect of driving out specific competitors and of making it an almost insurmountable obstacle for new importers of cellophane.

The Government wishes to make it clear at this time that it does not criticize the defendant's right to ask for an increase in tariff rates nor the fact that an increase was granted, for that is what the tribunals were created for.

The Government contends that this increase in tariff was obtained by Du Pont with the intent to monopolize, to gain the field for itself. This was one of the means by which Du Pont obtained its monopoly.

The COURT. Well, what is the whole theory of the tariff law?

Mr. ROACHE. Well, the whole theory is to make the price high so that the domestic producers will be able to sell their product here in preference to foreign manufacturers.

The COURT. In that respect wherein did Du Pont differ from thousands of other business concerns in the country with respect to the tariff?

Mr. ROACHE. I said with respect to the tariff they had a right. We don't question their right. But this was a legal means by which they maintained their monopoly and it shows their intent to monopolize. They were the only person in the field, your Honor, at that time, the only domestic manufacturer
6453 of cellophane, and they weren't satisfied with that. Their intent was to get the field one hundred per cent, and that is what we are trying to show, the intent to monopolize, whether obtained by a legal or illegal means. There is still the intent to monopolize. And that cloaks the whole thing with illegality.

Mr. GESELL. Now; is that the end of your proffer of proof, Mr. Roache?

Mr. Roache. I haven't put the documents in.

Mr. Gesell. I mean up to the documents.

I have an objection which I wish to make to this line of inquiry which I wish to state in all seriousness to your Honor because I think a very important problem is presented.

We were notified by the Government that they intend to put in about 25 exhibits on this subject that is going to involve about 200 pages of documents and material. These relate to paragraph 190 of the trial brief of the Government in which the extraordinary charge is made that Du Pont has perverted its right of advocacy in petitioning Government agencies and Federal courts for redress against what was erroneous government action in improperly classifying cellophane under the Tariff Act.

Mr. Minicus. Well, Mr. Gesell——

Mr. Gesell. Let me finish.

Mr. Minicus. Not when you misread what we have
written. Where did we say there was any erroneous Gov-
6454 ernment action?

The Court. Let us have an orderly procedure. Mr. Gesell had the floor before you got up. Let him finish and I will hear you at length.

Mr. Minicus. Thank you, sir.

Mr. Gesell. We feel that this line of injuiry, your Honor, is irrelevant, impertinent and contemptuous. The Court has already taken judicial notice of the tariff statutes here involved and of the decisions under which Du Pont's position was ultimately sustained.

Now, there is no charge in these proceedings that any of the matters before the Government agencies and the Courts were irregular or not proper, but the charge is a perversion of a right of advocacy.

If your Honor please, in our judgment this is part of a new campaign by certain representatives of the Anti-Trust Division in their general attitudes about large corporations to charge that big companies act improperly even when they merely invoke the processes of a Federal court or agency to interpret a law or enforce a right. This problem has been coming up in recent cases, and the Courts have been taking a very firm view with respect to it to protect their own jurisdiction.

The position that the Government now seems to be advancing
in these cases is that anyone who is alleged to be
6455 dominant doesn't have the right of redress to a court where
such actions may result in some competitive effect. The
Division has gone so far as to suggest that even the defense of a lawsuit brought by the Government is to be criticized if the defendant is dominant.

Twice, your Honor, in this last year Federal District judges have stated that they will not tolerate this effort to deprive citizens of their right just because they are big. The situation has come up twice very sharply, once before Judge Medina in the Investment Banking suit where he rebuked the Anti-Trust Division for bringing charges against a group of investment bankers on the ground that they joined together to oppose legislation requiring competitive bidding. He sternly reminded the Division on a number of occasions that this action of the investment bankers merely constituted the exercise of fundamental constitutional rights and that the Courts would protect those rights, and he asked the Government to withdraw the issue from the case.

We have an even closer analogy, your Honor, in the opinion of Judge Knox in the Aluminum case, dealing with just this kind of suggestion, which was advanced there at 91 Fed. Supp. 333, page 415, by the Government in its brief. And I would like to read, your Honor, what Judge Knox had to say about this matter. The Government argued in its brief as follows, according to the opinion, and I quote:

6456 "Perhaps the most revealing manifestation of Alcoa's abiding purpose to dominate this industry is its petition filed in this Court on March 31, 1947. Alcoa asserted then that competitive conditions had been established and that it was entitled to a judgment that it no longer had a monopoly. * * * it seems clear that Alcoa's petition was premature and can be explained only by a purpose to defeat the jurisdiction of this Court upon a mere showing of distribution of plant capacities."

Now, what did Judge Knox say about that?

The COURT. That was the Government brief?

Mr. GESELL. That was the Government brief.

What did Judge Knox say about that? He said:

"The inescapable logic of this contention, it would appear, is such as would lead me even to condemn the vigorous defense that Alcoa has here interposed to the Government's action upon the ground that it constitutes evidence of Alcoa's unlawful purposes. All I can say is that when theories of law begin to lose touch with the realities of normal behavior, it is highly desirable that the theories undergo a bit of modification."

I press this, your Honor, in great seriousness because I think the Bar and the Bench have duties with respect to matters of this kind and that I have an obligation to bring it to your Honor's attention. We are here being condemned and charged with perverting a right of advocacy because we went into court

6457 and persuaded the Court that the Treasury Department had improperly classified cellophane under a tariff. I think we must press our objection here and ask this Court to add its influence in striking down at the incipiency, this mistaken effort of certain over-zealous representatives of the Division even to bring into the context of these cases lawful action taken by parties before Courts and Federal bureaus.

I think the issue is bigger than this case, and I protest bringing in 200 pages of documents, certified from the Treasury Department, certified all around, to show that we filed petitions and pursued an orderly course and won a case in court.

Mr. Minicus. Your Honor, I would like to read the Government's contention as contained in its trial brief exactly as it is written——

The Court. Wait a minute. Did you say Judge Knox did not quote you accurately?

Mr. Minicus. This is our own. I am not dealing with Judge Knox.

The Court. Your trial brief?

Mr. Minicus. Yes, paragraph 190:

"Defendant perverted its right of advocacy * * *" Now, the Government there certainly acknowledges this right of advocacy; we acknowledge that any corporation can go before a Congressional committee or a Court and present its point of
6458 view. There is no question about that in this case and we are not challenging it. " * * * before government tribunals by demanding and obtaining an increase in the duty for cellophane with the intent and effect of driving specific competitors from the industry."

The Court. Now, let's get to the quick of the matter. What is your proffer of proof on that intent?

Mr. Minicus. Statements by the duPont Company that the reason they were striving for this increase in the tariff was to cement and perpetuate their monopoly.

The Court. Well, where do those statements appear?

Mr. Minicus. In the evidence that Mr. Roache will offer into evidence.

The Court. Are they a part of the proceedings?

Mr. Minicus. No, sir. They are letters written from one person in the duPont Company to another, or to a co-conspirator.

I submit, your Honor, regardless of all of Mr. Gesell's statements here today, that every Court in this country, every Federal Court, has admitted that you can achieve illegal ends through lawful means. There is no question about that, I don't believe, in the law today, that lawful methods can be persued in the accomplishment of an unlawful end. In this case we maintain the unlawful end is monopoly.

Now, in the course of proving a monopoly we have
6459 offered the Court two theories, one of which involves the
proof of intent. If we can show that the duPont Company had in its mind before it ever approached one of these tribunals the approach with the intent to monopolize, then I think we are entitled to show that intent. Otherwise we have been deprived of the right of proving one of the elements of our case. We maintain that before any agency was approached, before they even knew what line of attack they were going to take, they decided that this was a line of attack, one of several, by which they would be able to reach the culmination of their monopoly.

The Court. Here is my difficulty at the moment. Where do you draw the line between a person who seeks a protective tariff for purposes of maintaining his position in any particular industry and a person, such as you claim duPont was in this situation, who uses the instrumentality of the tariff tribunal, as you say, to monopolize? I want to see if it is possible to draw the line
between that which is lawful and that which is unlawful.

6460 Mr. Minicus. We say that this action in approaching
these tribunals was perfectly lawful. We don't say there was anything unlawful in this advocacy that they had before the courts and before the Congressional Committees. We say that was perfectly lawful. We say, however, it was accompanied by an intent that we have the right to prove, and that intent showed the purpose to monopolize. It is the intent we are proving and not the contact with the Government tribunal or agency, but the intent that went along with it that the agency or the tribunal never knew about and never came into the hearings at all, the intent that was announced before any approach was made. That is the thing we are striving to prove here, your Honor.

The Court. If the intent had been made manifest to the tribunals is it your thought that they would not have granted the relief sought?

Mr. Minicus. I certainly do; I certainly do, your Honor. I believe that if the tribunals had had the foresight to look ahead twenty years and see this monopoly structure that is existing today, and that that intent was then in the minds of Du Pont for this tariff increase, I don't think it would have been granted; but we must admit, your Honor, that we are dealing entirely in suppositions. That is hard to say.

The Court. What I mean, Mr. Minicus, is this: You charge that in utilizing, as I said, the tariff instrumentalities Du Pont
was guilty of some misbehavior?

6461 Mr. Minicus. Absolutely not. That is the first premise.
We say that when they went along to that court or that Congressional Committee there was—we have something that nobody else knew about, an intent to accomplish this and for the

purpose of monopolizing, and we say that they have expressly admitted that in their own correspondence to co-conspirators and among themselves, but they never told the court or the Congress. In other words, what we are trying to prove here, your Honor, is the intent, not the fact of the doing of the thing, but that undisclosed state of mind that went along with them every time they went into one of these courts or before the Congress. That is the only thing we are trying to prove here.

The COURT. Let me ask you one further question: You said you don't want to deal in suppositions. I agree with you. I am trying to test your theory.

Assume that they did not have the intent but the result would have been the same.

Mr. MINICUS. We would have had no proof of this today, your Honor. We would not be here on this issue.

The COURT. Then what difference does it make whether they had the intent or not, because it is the same situation insofar as the restraint on competition or the formation of a monopoly is concerned. Where does the fact have relevance if the result would have been the same if the tariffs would have been modeled 6462 and styled to Du Pont's wishes whether they had the intent to monopolize or whether they did not have the intent to monopolize. If the result would have been the same where are we?

Mr. MINICUS. As to that particular tariff action?

The COURT. Yes.

Mr. MINICUS. It is not the tariff action we are trying to prove; it is the monopoly existing today, and we are trying to show twenty years ago they had that intent to monopolize. It is the monopoly we are trying to prove, not the result of that action, and that that intent to monopolize existed at the time of this tariff situation over twenty years ago.

The COURT. I will tell you what I want you to do: Some time before we resume after the luncheon recess pick out two or three examples of what you have in mind that I will find in this evidence and read them to me.

Mr. MINICUS. I think Mr. Roache has them right here now, your Honor. I think he can find them on an instant's notice.

The COURT. Give me a typical example. I don't want you to start now in the beginning or the middle or the end; just show me what you think is critical of this point.

Mr. GESELL. I think while Mr. Roache is looking for his best example, your Honor, what I might do is point out that what is involved here is how cellophane should be classified 6463 under an existing tariff act, not the raising of duties, but the question of whether the Treasury had properly classified cellophane in one compartment or another, which was highly litigated.

The Court. Well, was there any price differential involved depending on the question?

Mr. Gesell. Yes, there was a higher duty if it was classified the way Du Pont wanted it than there was if it was classified the way the Treasury said it should be, and the court held Du Pont was right and the Treasury was wrong.

Mr. Minicus. I submit that is the same kind of fog that was thrown out around the interference issue. We don't care how it was classified or what kind of classification it should have. We don't care what happened there. We are just saying that Du Pont went there with this intent to monopolize and that is all we want to show, just like those agreements in the interference section were there to prove the exclusion of certain people, regardless of what the agreements grew out of. It was the agreements there and it is the intent here, not what the classification was or whether the price went up or down. We want to show the state of mind of the Du Pont Company as they walked into that tribunal, and that is all we want to show.

The Court. In other words, you say company A merges with company B and then the resulting company merges with company XYZ. The mergers are perfectly legal, you say, but
6464 you want to show the intent behind the mergers.

Mr. Minicus. Exactly, your Honor.

The Court. Have you found it yet, Mr. Roache?

Mr. Roache. In this Government Exhibit 1071 that is in evidence, it is a letter to Mr. Yerkes from Mr. Spruance, and it says:

"As regards the effect of Birn & Wachenheim's operations on the interests and profits, present or prospective, of the Cellophane Company, I do not see why this situation is not likely to be of short duration and that from the standpoint of both probable ultimate outcome and time required, the Cellophane Company would do better by not testing the patent situation and counting rather on Birn & Wachenheim losing interest in the matter in the comparatively near future as a result of increase in the duty from 25 to 45% and/or La Cellophane being successful in their efforts, which they are doubtless making and which it is up to them to vigorously follow up, to prevent quantity shipments of their product from Europe or England to the United States."

The Court. Well, let us recess for lunch. Recess to 2:15.

(At this point a recess was taken until 2:15 o'clock P. M., the same day.)

6465 2:15 O'clock, P. M., the Same Day.

Present: As before noted.

Mr. Roache. Your Honor asked me to read some documents which would show this intent of Du Pont. This intent is not shown just by one document stating "We are going to monopolize," but the intent will be shown by four or five documents that I will read.

The COURT. I gave consideration to the problem during the luncheon recess and I am ready to rule on the objection.

I agree in principle with the views pronounced by Judge Knox and by Judge Medina, but I don't think we have the situation here that was before them. Here no one, not even the Government, challenges the right of Du Pont to seek tariff protection, nor can anything critical be made of the fact that they sought and obtained protection. But the issue in this case is monopoly, a monopoly the Government charges was conceived illegally and maintained illegally. The intent, therefore, is one of the major considerations to be examined.

I have concluded that if there is any writing or document which discloses intent I want to consider such evidence. I don't know whether the proffered evidence will show the intent the Government says is there, and I ultimately will have to decide that 6466 question; but in the meantime for the purposes of trial the objection is overruled. Proceed.

* * * * *

6473 The Government introduces into evidence Government Exhibit 4469 at page 6249. It is a Du Pont Cellophane Company bulletin No. 43-E to all salesmen.

(Bulletin No. 43-E dated February 28, 1929, To All Salesmen, entitled "New Customs Regulation, Imported Sheeting," was received in evidence and marked Government's Exhibit No. 4469.")

Mr. ROACHE. It is entitled "New Customs Regulations, Imported Sheeting."

It states:

"For your information, the Customs Court has decided in favor of the Du Pont Cellophane Company that 'Cellophane', or similar transparent sheets, shall be entered as a compound of Cellulose.

"How else could it be classified? Well, for the last eight years or so, thru the efforts of those who were importing at that time, it was accepted by the Customs Appraisers as 'gelatin in sheets'. It was perfectly obvious what we should do, and we have been endeavoring to have correction made for three years.

"A higher duty was not asked for—merely the proper classification. This calls for a higher duty, but not substantially so, and, regardless of the statements made by our kind competi-6474 tors, we are not going to immediately increase the price of 'Cellophane'."

I have a group of documents here, your Honor, that I will not read but I will merely refer to them as they are documents taken from the Treasury Department, certified by the Treasury Department as official documents taken from their records, and these merely show that Du Pont was the one who instigated the proceedings for a higher duty. Government Exhibit 1496——

Mr. Gesell. He is going on into the proceedings, your Honor, letters of our counsel, rulings and matters of that kind, that I talked about, on a charge of perversion of advocacy, whatever that is.

The Court. Well now, there was a mention made here this morning of some 200 pages in the documents. Do you intend to read those?

Mr. Roache. No, just refer to them.

Mr. Gesell. Well, are they just going to be dumped in, your Honor?

The Court. I imagine.

Mr. Gesell. Well, I object to that and press my objection. That isn't within your Honor's ruling on the issue of intent.

Mr. Minicus. It was Mr. Gesell, I might remind the Court, who early in the trial instructed Government counsel that isn't necessary to read every document in evidence——

6475 Mr. Gesell. We are not talking about that.

The Court. The ruling I made when I came out on the Bench was that I was interested in any document or writing, regardless of the source, that showed intent. Now, do these documents, according to your contention, show intent or just activity?

Mr. Gesell. They just show activity, the formal protests and letters back and forth, exceptions taken to rulings.

The Court. Do you think that I ought to sit down and go all through that stuff in the face of this gigantic record that is before me when all you are interested in is the ultimate fact that Du Pont was a party participant?

Mr. Gesell. And you have taken notice of those cases that show the parties and what the issues were.

Mr. Roache. If the defense is willing to admit that through the course of the years they consistently kept after this tariff increase——

The Court. The last document you read said it was a work that took eight years. That is in.

Mr. Roache. Then I won't submit those documents. I feel there are other documents that have shown their intent to exclude the competitors. I will now come to the documents which show the effect of the tariff.

6476 The Court. Is there anything in the proceedings before the various tribunals which according to you shows that Du Pont didn't make accurate statements?

Mr. Roache. Not that I know of.

The COURT. I am going to take the end result of their activity. I am not going to pursue all the proceedings before the tariff tribunals.

Mr. ROACHE. These documents, your Honor, are about six or seven in number, and they are to show the amount of imports before the tariff rise and what there was after the tariff rise.

I refer to Government Exhibit 420 at page 5636. This is a report of the Du Pont Cellophane Company from the Executive Committee to the Board of Directors dated March 21, 1929, entitled "Monthly Report DCXB-6—Recommendation for Action." I read the last paragraph:

"In addition to this, the recent decision of the Customs' Court has apparently caused one of our competitors to withdraw discounts to the jobbing trade and special prices to some of their large trade. Some of this trade has already sent orders to us and some of it has approached us regarding the establishment of arrangements for securing their supplies of transparent material from us. If it should develop that, in addition to exceeding the forecast at the present rate, we are successful, also in availing ourselves of any part of this heretofore competitive busi-
6477 ness, we may be called upon to supply an additional half-
million pounds to new trade throughout the ensuing ten months to the end of the year."

* * * * *

6481 I refer now to Government Exhibit 433 at page 5701 entitled "Du Pont Cellophane Company, Inc. Quarterly Competitive Report, Third Quarter 1929."

Page 5702 states that the present tariff rates make it unprofitable for Birn and Wachenheim to offer material concessions below Du Pont's present scale of prices.

The fourth paragraph states that Henle has practically discontinued importing and distributing transparent cellulose sheeting.

Page 5705 gives a comparison of the sales of cellophane between the two importers and Du Pont. It also states that Birn and Wachenheim sold 5% of the total during the third quarter, compared to 9.5% in the previous quarter, and that the sales of Henle are practically negligible now, being only .2% of the total.

I refer now to Government Exhibit 434 at page 5713, Du Pont Cellophane Company, Inc. Quarterly Competitive Report, Fourth Quarter 1929.

6482 At page 5717 there appears the statement that no sales by Henle Waxed Paper can be accounted for.

On page 5720 there appears Table 3, summary of all transparent cellulose sheeting sales in the United States. Pound figures are in the thousands. It shows net sales for Henle or other companies except Sylvania, who took over the agreement—I might add in here, your Honor, that when the agreement with Birn and Wachenheim and La Cellophane was terminated and Du Pont took over, Birn and Wachenheim then turned to Sidac to purchase its cellophane, and that is the concern with whom Sylvania made its contractual agreements whereby it became a manufacturer in the United States, and when Sylvania took over, Birn and Wachenheim stepped out.

It shows, I might state again, no sales for Henle or other companies except Sylvania and Du Pont for the fourth quarter of 1929.

I turn to page 5721 which I will just read the third paragraph here:

"The change in the tariff situation has been a factor in restricting the importation of competitive material. This combined with Du Pont price reductions is partly responsible for the curtailment in the competitors' activities. The definite need in certain industries for a moistureproof sheeting and the competitors inability to supply it, has also aided Du Pont in regaining business formerly enjoyed by the competitor."

6483 Then on page 5724 there is another statment that Henle is definitely out of the competitive picture.

Now, I feel, your Honor, that these exhibits that we have just introduced have shown Du Pont's intent from the very beginning, before they ever concluded their contract to manufacture, to have the duty increased as a protection so that they would have this market to themselves. The documents show that they had this intent all the way through, and as admitted by the defendant, did consistently advocate this increase before the tariff tribunals. The documents introduced toward the end have shown the imports of the competitors prior to the time of the tariff rise and the imports subsequent, which for Henle was completely wiped out, and Birn and Wachenheim held on for a while until Sylvania took over, and then he went out of the picture, and that left the present situation, the situation up to 1946 of Sylvania and Du Pont, the only manufacturers of cellophane.

I wish to state again that all we wanted to prove by this was the intent of Du Pont to obtain 100% of the market by the duty increase.

Mr. Gesell: Your Honor, I am not going to go over this ground because I covered quite a bit in my objections. It seems to us that the intent he is talking about is some kind of an illegal intent and that there is nothing illegal in seeking to have an existing statute properly applied as to your business,

6484 recognizing that it will have some effect on imports.

I do think there is one further part of the story that should be brought to the Court's attention. The decision that finally confirmed the correctness of Du Pont's position with respect to this classification matter was handed down on June 12, 1929. I have already cited the Court to that at page 494 of the transcript.

One year later, your Honor, a new tariff act was passed with different duties, and from 1930 on the duty that applied as to cellophane was not any duty that was brought about by Du Pont's efforts to have the old Act properly applied, but resulted from a new statute, the Tariff Act of 1930, Paragraph 34 (b). So these effects that Mr. Roache is talking about——

The Court. Were for only a year?

Mr. Gesell. Were for only a year in the period from June 1929 until the Tariff Act of 1930 went into effect.

Mr. Minicus. I submit that is immaterial, your Honor. I have an objection to that.

The Court. Just a minute. You will be given an opportunity to answer Mr. Gesell.

Mr. Gesell. There is one other factor that I would like to point out, that of course these imports pertain to plain cellophane and that the issuance of the moistureproof patent shortly after the Tariff Act or about the time of the Tariff Act of 1930, from
6485 then on it was impossible for any moistureproof to come in, regardless of what the tariff situation was.

Mr. Minicus. I would like to have the record show an objection to that statement too, if your Honor please.

The Court. I would suggest you make a note of all your objections and then when he is finished read them off seriatim and I will hear you at length.

Mr. Minicus. Thank you, sir.

Mr. Gesell. Your Honor is aware of the decisions with respect to that matter.

The Court. If you have a citation of the authorities there I would like them again put in the record so it will be of convenience to me.

Mr. Gesell. You are talking about the tariff decisions, your Honor?

The Court. No, the 1929——

Mr. Gesell. Yes. They appear at page 494 of the transcript, and perhaps if I simply state that, I have there cited both the acts and the decisions.

The statement was made in the argument this morning that this intent of Du Pont to affect imports by getting proper classification of the tariff was some sinister, hidden intent that Du Pont did not reveal in its dealings with the Government, and it was even stated that had the Government known that Du Pont had this intent the

tariffs of this kind would never have been put up. Now,
6586 your Honor, I have before me the hearings on the Tariff Act
of 1929 as it was then called, because they were held in June of 1929, but they were the hearings that led to the enactment of the Tariff Act of 1930, and I think it is significant that in the hearings on this H. R. 2667——

Mr. Minicus. Mr. Gesell has objected once when the Government tried to put hearings of this nature in. Now he is reading Congressional hearings and he is reading them in our case, your Honor.

Mr. Gesell. I am beginning to lose interest in his case, your Honor, and I am trying to get the facts out.

Mr. Minicus. I will appreciate it if you wait until we finish.

Mr. Gesell. What happened on those hearings, your Honor——

Mr. Minicus. I object to Mr. Gesell's reading documentary evidence into the plaintiff's case.

Mr. Gesell. I am simply trying to answer the argument that was made this morning, your Honor.

Mr. Minicus. There is a time in legal proceedings for the defense, your Honor, and his time has not arrived yet.

The Court. I don't think he should be restricted if he wants to make reference to a Congressional record.

Mr. Gesell. I ask your Honor to take notice of these hearings.

The Court. What is the publication?

6487 Mr. Gesell. It is "Hearing Before the Sub-committee
of the Committee on Finance of the United States Senate, Seventy-first Congress, First Session, H. R. 2667, Volume 1, Relating to the Schedule 1 on Chemicals, Oils, and Paints, Hearings held June 14th to June 18th, 1929 on the Tariff Act of 1929."

The Court. Is it a publication of the United States Government?

Mr. Gesell. Yes. It is printed by the United States Government Printing Office in Washington.

The Court. You may utilize it and I am accepting your statements from it for the purpose of getting a full understanding as to the significance of the tariff. That is all.

Mr. Minicus. Yes, your Honor.

Mr. Gesell. On those hearings which took place in June 1929 and which led to the Act of 1930, Birn and Wachenheim appeared by their counsel and by a representative of the Company and protested the proposals to increase tariff rates and asked for a reduction, and they submitted a memorandum, and in that memorandum they pointed to the fact that Du Pont was established in this business at Buffalo, that it had been constantly reducing prices

of cellophane, that Du Pont had a deal with the La Cellophane Company, purchasing their patents, which precluded La Cellophane from selling cellophane in the United States, and then
their memorandum said, "As hereinafter pointed out, a
6488 rate in excess of 25% would make it impossible to import
these sheets and would give the Du Pont Company a monopoly. Thus the entire American packing industry would be unable to buy this necessary wrapping material in a free and open competitive market, a healthful condition in any industry, but would be forced to depend for its entire supply on one American manufacturer. It is reasonable to suppose that such a situation would result in an increase in the price of food products wrapped in these sheets."

And it was argued with the Committee at length, and Birn and Wachenheim said it could not stay in this business if this tariff was imposed, and the Congress imposed the tariff.

Now, I ask your Honor, Whose intent was it? And to suggest that there was some deep, sinister intent that was hidden I think is most inappropriate, coming from the Government, in the light of these documents.

The **Court**. Now Mr. Minicus.

Mr. **Minicus**. Your Honor's attention is invited to the fact that Mr. Gesell prefaced all of his remarks with the statement that this new Tariff Act and this new moistureproof development came out a year after all of the evidence, a year later than all of these effects that Mr. Roache pointed out and read into the record from our documents. Now, during that time, 1929, Mr. Roache's evidence, the Government's evidence showed these
imports to Henle and Birn and Wachenheim and a few
6489 odds and ends of small importers falling off during that
year. It showed that in that year Henle just stopped. He threw in the sponge. Birn and Wachenheim was down to approximately 5% where there was no profit in the business any more. They got out through Sylvania. There were no importers left. Then after that was all over this moistureproof cellophane thing is brought up and this new Tariff Act of 1930.

Now, I ask myself what effect can that possibly have upon all these events what happened a year before? This was a fact accomplished. The importers had been driven out. They could not stay in business any more. I fail to see any materiality of the moistureproof production coming along a year later in this new Tariff Act about which he has just read you all these things when this was all done. It was all accomplished; the importers were through. There were no more importers in the United States.

Now, in response to Mr. Gesell's statement about whose intent it was, here we have seen in documentary evidence written by the defendant corporation itself in a whole memorandum devoted to a study of how they can get into this business and keep it, that they don't think it will be worth getting into unless they can hold it in a nice little monopoly. They consider patents, they consider prices, and finally they consider the tariff as offensive weapons, and every bit of it is in that memorandum that 6490 we read. So on that basis they went into the business; and then, lo, unhappy days, came the awakening. Their patents were not as good as they thought they were. In fact, they admit they are no good. So they started that suggestion on prices and tariff, and every letter that Mr. Roache read for the year 1925, 1924, what do they talk about? They talk about Birn and Wachenheim and prices and tariff. Patents once in a while. And every time they talk about patents they say, "Oh my goodness, that is no good. We will have to discard that. We will go back to prices and tariff." Prices and tariff. Prices and tariff to do what? To make a fair profit themselves or to drive the only other people in the business out, the importers?

So time after time they went back to the Government agency. Finally it was reclassified. That is all right. We are not kicking about that. We are kicking about the intent to monopolize that motivated that repeated going back to the Government agency, and we see the effects of it. Henle out, Birm and Wachenheim out, nobody in for several months until Sylvania comes along finally. I ask Whose intent was it? And what is the obvious result? Year after year it doesn't make any difference whether the importers are in or whether Sylvania is in or who is in the business. It comes down to 75% Du Pont and 25% the others. That is not accident.

6491 We move now, your Honor, to paragraphs 181 and 182 of the trial brief, in the index under IV 5, sub-section (b).

It is the Government's contention, your Honor, that as an aid in perpetuating its monopoly position in cellophane and caps and bands, and to assist in anticipating developments detrimental to its dominance in said industry, Du Pont maintained and utilized a constant surveillance of activities by the existing manufacturers and by potential competitors.

I intend to break the proof of this contention into four categories. The first exhibits now to be introduced are probative of the fact that Du Pont utilized its organization of employees for the purpose of spying out competitive progress and provided said employees with plans and suggestions on how to accomplish this objective.

The Government offers into evidence Government Exhibit 4008 at page 4241.

(Memorandum from E. A. Wight to W. J. Harte dated March 11, 1943, was received in evidence and marked "Government's Exhibit No. 4238.")

Mr. Roache. This is a Du Pont Cellophane Division memorandum dated March 11, 1943 from E. A. Wight, who at that time was the San Francisco District Sales Manager, to W. J. Harte, who at that time was Sales Manager in charge of direct sales. The subject is "Competitive Strategy."

It reads:

6492 "As requested at the staff meeting we are listing methods that we have found successful in getting competitive data from two source of supply accounts. Up until now, of course, we have not been calling on 100% competitive accounts:

1. Reference to the yardstick of 1942 purchases with accounts begging for more film sometimes brings out facts regarding competitive activity, even with accounts we may have considered as 100% du Pont.

2. Pointing out that orders placed with us exceed the 90% permitted under L-20 often brings denial and figures to prove it, thus uncovering competitive sales.

3. Where past experience led us to believe an account was buying from Sylvania on an agreement, questioning as to whether or not, in view of the present delivery situation, the customer will make an agreement discount during the current period has gotten us the information we wanted."

The Government introduces into evidence Government Exhibit 4299 at page 4183.

(Memorandum from E. M. Wallace to W. J. Harte, dated March 21, 1943, was received in evidence and marked "Government's Exhibit No. 4299.")

Mr. Roach. This is a Du Pont Cellophane Division memorandum from E. M. Wallace, who at that time was the Chicago Sales Manager, to W. J. Harte, Sales Manager in charge of direct sales. The memorandum bears the date March 21, 1943, "Subject: Competitive Strategy." (Reading.) 6493

"In order to get data on competitive poundage purchased by accounts, the following are ways of drawing out facts.

"1. Get into plant and talk to the men in production departments.

"2. Tell an account what he is buying from competitor. Make the guess high or make real low. Usually it will draw a correction.

"3. In baking industry especially get account to give their 'Use' figure when discussing their requirements from us. This will give an accurate competitive figure.

"4. The present situation makes it possible to ask the account specifically how much they are and have been buying from competitor. Many times the accurate answer will be given.

"5. Discussion on production of various volume items can be transposed into film poundage and then used to ask a question about amount of this business that was given to the competitor.

"6. Talk to the stock men—he is sure to show you how much he knows about the business—his job particularly.

"7. Don't put any one on the witness stand—questions 6494 should be part of a general chat usually. In other words, make the 'Break' for yourself and then smartly take advantage of it.

The COURT. Is this under the cloak and dagger section of the index?

Mr. GESELL. He is suggesting that these documents with respect to competitive strategy show the absence of competition.

The COURT. These are the devious ways to find out about it.

Mr. GESELL. Yes.

Mr. ROACHE. We are showing the manner in which they correlated and obtained from other people the information relative to the competitive situation.

Mr. GESELL. Of course if his theories were right, we would just call up Sylvania and ask them; we wouldn't have to go to any of this nonsense.

The COURT. Well, it is more interesting to me than tariff. Go on, Mr. Roache.

Mr. ROACHE. (Reading.) "I don't believe we can set down any definite way to get information. A plan used unwisely by a man will result in failure."

The Government introduces into evidence Government Exhibit 4300 at page 4184.

(Memorandum from C. B. Estabrook to W. J. Harte 6495 dated April 8, 1943, was received in evidence and marked "Government's Exhibit No. 4300.")

Mr. ROACHE. This is a Cellophane Division memorandum dated April 8, 1943, from C. B. Estabrook, who at that time was the New England District Sales Manager, to W. J. Harte, Sales Manager in charge of direct sales. The subject is "Competitive Strategy." (Reading.)

"In most instances our customers are as bright as we are, * * *"

Mr. GESELL. We will stipulate that, your Honor.

Mr. ROACHE. "* * * and they are quick to sense the fact that the salesman is fishing when he begins asking guarded questions. A good deal of 'subtle questioning' is about as subtle as a man falling through a skylight.

"The New England men have three ways they have found effective in some cases where they have suspected competitive material:

"(1) Instead of asking whether he uses competitive material, they ask, 'What proportion of competitive material do you use—50%?' Nearly always the customer will answer, 'Only about 30%' or 'Only a very small amount—negligible' or 'About 10%.' Generally the salesman learns what he wants to know.

("2) Ask 'Whose material do you find works better . ours
6496 or our competitors?' Very often this gets an admission
they do use some competitive material, or else an emphatic, 'We use only Du Pont material'."

Mr. Gesell. Of course he is getting into the field here, too, your Honor, which perhaps is precluded by the ruling.

Mr. Minicus. Would Mr. Gesell like to make this presentation for the Government, your Honor? He has been up more than Mr. Roache.

The Court. I think you are both about even. Go on, Mr. Roache; see if you can't have a part in this.

Mr. Roache. (Reading.)

"(3) Where a concern complains because it isn't receiving all the cellophane it wants, and how far short of its needs are our shipments, to tell the customer approximately what proportion of his 1941 purchases we were supplying. Where this doesn't agree with customer's idea of amount curtailed, he will frequently be led to say he bought from a competitive source also. Where he does, it is a simple matter to find out how much he has been using."

The Court. Who do you say was the offer of these writings?

Mr. Roache. These are reports from the various sales managers of their field offices. These reports are reports to W. J. Harte, who is the Sales Manager of the direct sales, and they are
telling him, in response to his request, how they have
6497 instructed their men and how their men go out into the
field and get this information.

The Court. I see.

Mr. Roache. Each seems to have a different theory on how to get it.

The Government introduces in evidence Exhibit 4301 at page 4185.

(Memorandum from M. H. Wheat to W. J. Harte dated April 9, 1943, was received in evidence and marked "Government Exhibit No. 4301.")

Mr. Roache. This is a Cellophane Division memorandum marked "Personal & Confidential," dated April 9, 1943, from M. H. Wheat, who at that time was a San Francisco Sales Manager, to W. J. Harte, "Subject: Competitive Strategy." (Reading.)

"Your letter of April 5th asks for the competitive strategy used in order to determine facts concerning the amount of competitive material purchased by accounts. Such information can usually be obtained in a number of different ways:—

"(1) Ask them. Sometimes this direct frontal attack will bring forth the desired information but the type of attack depends to a large extent upon the individual to whom you are talking; one man might give you the information if you ask a direct question in a conversational rather than inquisitorial tone. With
6498 another type you might ask the question by putting the answer in his mouth such, 'You folks probably use about a thousand pounds a month don't you?'—But here again you have to know your man because you might deliberately place the estimate considerably above what you actually think he might be using and then trim it down later for comparative purposes.

"(2) Another method of determining competitive material used is to find out how many trucks the man is operating (if he is a baker) and by studying his line in the retail stores, together with perusal of items in his second day store, one should be able to estimate with a fair degree of accuracy just how much competitive material is being used.

"(3) The present critical shortage of cellophane gives us further opportunity to develop competitive information by asking an account 'Just what is the minimum amount of material you need to get by under present day circumstances? This inference might lead the account to believe you will make an effort to take care of him and we have found instances where such an approach will bring forth information otherwise unobtainable. This approach is a little off-side and we don't like to use it except in extreme circumstances.

"In eliciting such information from a competitive
6499 account much depends upon the personality of the individual to whom you are talking as well as the personality of the individual trying to obtain information—each must be synchronized to fit the peculiar characteristics of individuals as well as the exigencies of circumstances."

The Government offers into evidence Government Exhibit 4302 at page 4187.

(Memorandum from I. S. Gardiner to C. F. Brown dated April 1, 1943, was received in evidence and marked "Government's Exhibit No. 4302.")

Mr. ROACHE. This is another Cellophane Division memorandum dated April 1, 1943. It is from I. S. Gardiner, who at that time was Supervisor of the Promotion Section, to C. F. Brown, who was Director of Sales, "Subject: Technique for Obtaining Competitive Data."

The first page reads:

"Our understanding of this competitive job is that it consists of three parts:

"1. Evolving a technique of locating and appraising competition.

"2. Developing a method of interpreting this information and correlating it in a practical and accessible form.

"3. A study of the best methods of overcoming competition in order that they may be used quickly and effectively when the situation changes.

6500 "The following deals only with Part #1.

"The new report form furnishes the mechanical requirement for obtaining the information we need. However, we know from past experience that this is no guarantee of getting complete information—competitive or otherwise. Two things are necessary to proper functioning of this report form: (1) the will of the salesman to get the information and report it completely and accurately; (2) the ability to do so. The former seems to be largely a matter of Management selling the men on the need and value of proper reporting. The latter appears to require studying successful methods and making them available to all of our sales group.

"Successful methods of locating and appraising competition must, of necessity, change with conditions. They must be adaptable to various situations and various types of customers. Taken as a whole, they represent a flexible technique or pattern of thinking which will be of fundamental value as a part of the effective sales equipment of our men.

"Some of the methods of locating and appraising competition are:

"(a) Inventory check.

"(b) Comparison with similar firms.

"(c) Use of commission to men as key to quantity.

"(d) Checking stale percentages versus actual numbers.

"(e) The 'check back' method.

6501 "(f) Comparison of sales figures with previous figures.

"(g) Direct questioning and inspection of customers' records.

"(h) Discussion of post-war plans.

"(i) Contact on basis of offering stock for rated business.

"Further study and observation will undoubtedly show others. For the present, let us explain the above group."

Then there follows an explanation how each method of locating and appraising competition works. The information is obtained by the inventory check, by determining how much stock the customer has on hand with the rate of use, i. e., the amount purchased each month from duPont.

In comparison with similar firms, it states that the method can be used effectively in the baking industry. A comparison is made with duPont customers on the basis of the number of items in transparent sheeting, the number of trucks, the amount of production equipment, the area covered, the amount in stores, and so forth.

And in discussing the use of commission to men as key to quantity, the memorandum states, "A discussion of the present-day labor conditions can often be steered to a statement as to the average commissions a baker pays his salesmen. This, plus the number of men (or trucks), gives the figures necessary for getting total sales per week. A store survey will give an approximate ratio
between bread and cake or other items in cellophane. From
6502 this, approximate sales in units can be established and con-
sumption per week can be figured. If the baker is using some duPont material, the quantity and use of each size can be used as a check against the information obtained in the store."

Then the checking stale percentages versus actual numbers is done by ascertaining the percentage of the stale returns on loaded goods and the quantity of returns, then the production can be realized, and so the amount of cellophane used.

The "check back" method states it can be utilized during this period of scarcity as it presents an unprecedented opportunity to obtain competitive information. For those bakers who are close-mouthed this method is good. It consists of playing this year's figures against last year's, which the 90% clause of L-20 makes possible.

(Reading.) "Questioning, in a cooperative spirit, regarding how much the baker is allowed per quarter under L-20 should be the means of establishing 'key' figures from which actual competitive sales can be reckoned."

Then there is the comparison of sales figures with previous figures, a drop in the use of cellophane film being an alert which would necessitate a check against various factors such as the amount of business, number of items in cellophane, trucks operating, and so forth.

Then (g), under "Direct Questioning and Inspection of Rec-
ords," this is good only to those customers who are
6503 hard pressed for material and may see a chance to get film
by telling all.

(h) "Post-War Study." This is a method to be used to get information from one hundred per cent competitive accounts by telling them we must know what their total must be in order to make our plans.

(i) "Contact on Basis of Offering Stock for Rated Orders." If a customer is doing war business, it is a good basis for obtaining that percentage of business as compared to total business.

The exhibit on page 4190 goes on to say that the above are only a partial list of methods and that the men in the field should try them all at different times, and in time their technique will improve and they will find it easier to get information.

At the bottom of the page there starts a resume of the advantages and disadvantages of each method. I turn to page 4192, "Summary:

"It is felt the foregoing results are indicative even though the number of contacts was small.

"We believe the methods are worth incorporating in bulletin form. Our own field experience indicates this should be worthwhile because it would tend to keep salesmen from falling into the habit of depending upon only one or two methods.

6504 "One of the stumbling blocks we have in obtaining reliable information is our lack of uptodate data on indirect business.

"It is suggested that more emphasis be placed on getting 1942 figures. Reporting on this point is 'spotty' and there seems to be some difference of opinion as to its importance. Obviously, we need this information as a gauge for 1943 progress, and we need it quickly for use in judging the current picture.

"It is felt our contacts with the men have the added value of emphasizing the need for accurate competitive information and should result in more thorough reporting in the future. Another added value is that it overcomes to some extent the feeling among the men that Wilmington does not appreciate fully the competitive problems they face. The writer plans to continue this type of work where practical."

The Government offers into evidence Government Exhibit 4303 at page 4194.

Government's Exhibit 4303

(Memorandum from E. C. Lake to B. Y. Bandy and V. H. Peterson, dated August 31, 1945, was received in evidence and marked "Government's Exhibit No. 4303.")

Mr. Roache. This is a duPont memorandum dated August 31, 1945, from E. C. Lake, who was Sales Manager in charge of direct sales, to B. Y. Bandy, New York, who was a salesman in direct sales, and V. H. Peterson, Cincinnati, who was a salesman, Central Division. It is entitled "Reports by
6505 Industry."

"Although L-20 is cancelled as of August 31 and it is not mandatory for the trades to render a monthly report of Cellophane shipments by industry, there are nevertheless very good reasons why we should like to have this report continued.

"To know where Cellophane is going industry-wise is very important, as a matter of fact imperative from an advertising and promotional point of view. Such information guides us in setting up advertising quotas and measuring advertising effectiveness.

"This is not a one way proposition at all, as the converter will profit by having such a record the same as we will. On mentioning the fact that it is more accurate industry information, we can guide our activities so as to make it more profitable, not only to ourselves but to the converter as well.

"We consider the continuation of this report of sufficient value for you to make a concerted effort on all the trade to continue this report and we are sending you a supply of forms that you may pass out for their use. You will notice that these forms have been revised putting it on a strictly peace-time basis. I am enclosing one copy of the form previously used for your comparison.

"You may have some of the converters who report their sales in pounds by customers each month, tell you that it will not be 6506 necessary for them to make out this report since they have already given us the information. Unfortunately, the information they have given us shows the pounds sold a particular month to a certain customer, but in many instances that customer may use the Cellophane for more than one industry according to our industry breakdowns.

"Give this matter some thought and if there is any question you want to bring up for discussion, we can do so at the time of the meeting next Thursday and Friday."

That concludes the first part of that, your Honor. The purpose of that was to show the extent to which duPont goes in obtaining this information and the fact that they instruct their salesmen and have regular bulletin forms printed telling them how to check with the men, how to ask them questions, how to compute the business by figuring out how many trucks they have, how much bread they have on the shelves, and what their cutback is, what their war business is, and it gives a general idea of how duPont goes about obtaining this information and the extent they go to in obtaining this information.

The next group, falling under category 2, evidences that the employees of the defendant, in accordance with instructions of the duPont officials, gathered together samples of competitive material, oftentimes by devious means, and such materials were passed on to be thoroughly analyzed by duPont chemists.

Mr. Gesell. May I have some indication of what is 6507 meant by "devious means," your Honor?

Mr. Roache. Various means.

The Court. There is a difference between "various" and "devious."

Mr. Roache. Well, the ordinary means that you would obtain it, you would go out on the market and buy it. duPont didn't do that. They would contact agents and get their salesmen to go in and ask an agent if they could go and get it from somebody who they knew wouldn't sell it to them and they would have the agent replace it and duPont would in turn replace it to the agent. I don't think that is the usual way that people go about obtaining competitive material.

Mr. Gesell. Whatever Mr. Roache thinks, is he charging that any of this is illegal, that it is illegal to get a competitor's product and analyze it, or is it illegal to find out who the competitor is selling to, or how much? Are we charged with abnormality here, charges of deviousness? What is the charge? Is it legal or illegal?

Mr. Roache. We don't say that there is anything illegal about these actions in themselves, your Honor. I just want to show the general pattern, how duPont obtained all this information—how duPont, the monopolist, obtained all this information.

Mr. Gesell. Of course it occurs to me that if they were monopolists they wouldn't have even had to seek it.

6508 Mr. Minicus. If Mr. Gesell is asking Mr. Roache to define words, I would like to know what Mr. Gesell means by a monopolist. Apparently he has the Neanderthal idea that the only person who can be a monopolist is one who has one hundred per cent of the market. Nobody in this country ever had one hundred per cent of the market, and there have been a great many monopolists.

The Court. Let us get to the quick of the thing. What is the purpose of the offer as it supports the charge of the Government that there has been a violation of the Sherman Act?

Mr. Roache. We want to point out that these activities, being a part of the general pattern of the defendant's conduct, although not rising up to the level of a violation of the Sherman Act, disclosed a manifestation of monopoly in the cellophane industry.

In reference to that, your Honor, I would like to call your attention to the opinion rendered in United States v. General Electric Co., 82 F. Supp. 753, page 901, in 1949. Judge Forman, at page 901, said, and I quote—and he was referring to activities similar to these——

"Although these activities in collecting information may have been innocent isolated by themselves and might be readily countenanced as between genuine competitors, here they emanated from a

dominant force in the industry to envelope its controlled al-
6509 lies and the few remaining independent manufacturers. In that light, viewed in their aggregate, they represent a picture of espionage and policing activity. This surveillance was not for the ordinary purpose of sharpening competition but rather designed to reinforce and maintain the domination of the industry; and to inhibit the growth of existing, and abort the birth of new competition. These activities, part of the general pattern of conduct, do not of themselves rise to the level of a violation of the Sherman Antitrust Act but they disclose a manifestation of monopoly in the incandescent lamp industry by General Electric. Cf. United States v. Eastman Kodak Co., D. C. 226 F. 62, 78."

* * * * *

6521 The Government introduces into evidence Government Exhibit 4316 at page 4208. It is a Du Pont memorandum from C. L. Blair to W. J. Harte dated January 22, 1945, subject "Competitive Samples."

(Memorandum from C. L. Blair to W. J. Harte dated January 22, 1945, was received in evidence and marked "Government's Exhibit No. 4316.")

Mr. Roache. The first paragraph of the memorandum mentions that two samples of competitive material were received for investigation during January and that one sample was aged and not too good for testing.

6522 The last paragraph requests that in the future current film be obtained especially in view of the fact that Du Pont replaces the competitive material with an equal quantity of their own equivalent film of current manufacture.

The Government introduces into evidence Government Exhibit 4318 at page 4210. This is a Cellophane Division memorandum from R. R. Smith to W. J. Harte dated January 10, 1945, "Subject: Competitive Samples."

(Memorandum from R. R. Smith to W. J. Harte dated January 10, 1945, was received in evidence and marked "Government's Exhibit No. 4318.")

Mr. Roache. In this exhibit Mr. Smith states he is anxious to develop a system that will do a better job on securing competitive film and asks W. J. Harte's help.

The Government introduces into evidence Government Exhibits 4319 at page 4211, 4320 at page 4213, 4321 at page 4215, 4360 at page 4272 and 4325 at page 4219.

(Report dated March 30, 1945, to Dr. A. S. Hunter entitled "Code 3-A Film (Saran)" was received in evidence and marked "Government's Exhibit No. 4319.")

(Report to D. E. Drew from R. A. Hickman dated June 14, 1945, was received in evidence and marked "Government's Exhibit No. 4320.")

(Report from W. G. Hunter to C. F. Brown dated May
28, 1945, was received in evidence and marked "Govern-
6523 ment's Exhibit No. 4321.")

(Memorandum from J. C. Creadick to Mr. T. W. Holland dated November 19, 1945, was received in evidence and marked "Government's Exhibit No. 4360.")

(Memorandum from Nelson Allen to H. C. Broems dated February 27, 1946, was received in evidence and marked "Government's Exhibit No. 4325.")

Mr. Roache. All five of these exhibits contain reported results of tests made on samples of competitive material.

4319 is the report on Sylvania's Saran sheeting of a test made by General Foods Corporation.

4320 is a report of an analysis made by the Du Pont Laboratory on Sylvania Saran coated Cellophane and Sylvania semi-moistureproof film.

4321 reports checks made on Sylvania Saran coated Cellophane and gives a comparison with Du Pont's standard.

4369 gives a report of an analysis of Sylvania bands.

4325 gives a thorough report of an analysis made of Sylvania's film comparable to Du Pont's 300 LAT.

I refer now to Government Exhibits 4173, page 3966 and 4180 at page 3974, already in evidence.

4173 is a letter from Mr. Yerkes to E. K. Gladding enclosing a sample of Carbide & Carbon's transparent material, and
4180 is Mr. Gladding's report to Dr. Bolton of the analysis
6524 made of Carbide's material.

The Government introduces into evidence Government Exhibit 4324 at page 4218. This is a Du Pont memorandum dated March 2, 1945, from R. K. Reed to W. G. Hunter, subject "Competitive Film."

(Memorandum from R. K. Reed to W. G. Hunter dated March 2, 1945, was received in evidence and marked "Government's Exhibit No. 4324.")

Mr. Roache. It states that there is being forwarded samples of Sylvania's No. 300 film and to send replacement to Hill Brothers of Brooklyn, New York.

The Government introduces into evidence Government Exhibit 4481 at page 6268. It is a Du Pont letter from T. W. Holland to Mr. D. D. Lanning dated October 23, 1945, entitled "Sylvania Bands."

(Letter from T. W. Holland to D. D. Lanning dated October 23, 1945, was received in evidence and marked "Government's Exhibit No. 4481.")

Mr. ROACHE. In this letter Mr. Holland states that in accordance with their telephone conversation he was sending a jar of Sylvania white bottle bands similar to Du Pont's "Wind-O-Bands." Then there follows comments comparing the Sylvania bands with the Du Pont bands.

That concludes the evidence in category No. 2, your Honor.

6525 We are now at paragraph 184 of the trial brief and of the index IV 5 b. This next group of exhibits falls under category 3 wherein the Government will show that Du Pont obtained financial statements and information pertaining to the operations of the only other cellophane manufacturer which were carefully analyzed to ascertain confidential information. Defendant also enlisted the aid of its organization to ascertain the competitors' sales policies and activities.

The Government introduces into evidence Government Exhibit 4234 at page 4074. This is a report from L. A. Yerkes, President, to "P. C. EX. COM." and Cellophane Board of Directors dated 4/21/36.

(Report from L. A. Yerkes to "P. C. EX. COM." and Cellophane Board of Directors dated 4/21/36 was received in evidence and marked "Government's Exhibit No. 4234.")

Mr. ROACHE. This exhibit is a compilation prepared from Sylvania's March 1936 report comparing Sylvania and Du Pont Cellophane Company's investment and total operative investment. This includes cellophane and caps and bands.

The Government introduces into evidence Government Exhibit 4233 at page 4072. This is a letter from C. M. Albright, Treasurer, to Mr. F. G. Hess, Assistant Secretary, dated March 9, 1936, subject "Sylvania Industrial Corporation."

(Letter from C. M. Albright to Mr. F. G. Hess dated March 9, 1936, was received in evidence and marked "Govern-
6526 ment's Exhibit No. 4233.")

Mr. ROACHE. This exhibit contains comments on an analysis made by Mr. Adamson.

The Government introduces into evidence Government Exhibit 2657 at page 3481. It is a letter from the Manager of the Control Division to L. A. Yerkes, General Manager, Rayon Department, dated February 7, 1940.

(Letter from Manager of Control Division to L. A. Yerkes dated February 7, 1940, was received in evidence and marked "Government's Exhibit No. 2657.")

Mr. Roache. In this letter it is stated that Sylvania's 1939 Annual Report has been received and a short analysis is made in the letter with the statement that there is attached a statistical summary comparing the years 1937, 1938 and 1939 with those of the Cellophane Division. The statistical comparison is the next two pages of the exhibit. It is a very detailed comparison, comparing sales, net receipts, net profit, net profit per pound, operative investment, annual return on operative investment, total investment, and total fixed investment per pound, and so forth.

The Government introduces into evidence Government Exhibit 4336 at page 4238. This is a Du Pont memorandum from C. F. Brown to M. H. Wheat dated August 26, 1942.

(Memorandum from C. F. Brown to M. H. Wheat dated August 26, 1942, was received in evidence and marked
6527 "Government's Exhibit No. 4336.")

Mr. Roache. It reads:

"Dear Buck: I wired you yesterday as per the attached. The immediate need for this request is a disturbing indication of gains by competition during the first half of this year.

"For a number of years we have split the transparent business on the basis of about 80/20, or 79/21. On the other hand, during the first quarter of 1942, royalties paid us on moistureproof film showed a shift of 5%, and in the second quarter another 2%, so that the present status is about 73/27. This indicates that Sylvania has either taken a substantial volume of business away from us during that period, or has developed some entirely new business, or both.

"At the present time we are making a complete study of all competitive accounts to see how closely we can locate the sources of their business and how close we can come to the actual volume of moistureproof sales reported through royalty payments.

"We are therefore anxious for your very best estimate on Blake, Moffett & Towne and any other Sylvania accounts in the Western District. We do not want this to be colored by wishful thinking and would much prefer a figure on the high side rather than the low side.

"Your own trade records should give you the sum total
6528 of the Blake, Moffett & Towne business which you and your
men are contacting—in so far as their own personal estimates are concerned. However, salesmen's estimates are usually, as you know, on the low side and each important account should be carefully analyzed.

"In addition, Zellerbach ought to have a pretty good idea as to what B. M. & T's total business is. Then, of course, there is a certain amount of business which they enjoy which we do not contact, now even Zellerbach. So please go into the matter as thoroughly as possible and give us your best figure as promptly as you can.

"Inasmuch as we are trying to account for not only current volume of competitive business, but their gains as against the second quarter of 1941, we would like to have these two comparable figures.

"Also if there are any other competitive accounts we want your best estimates on them."

* * * * *

6531 The Government introduces into evidence Government Exhibits 4351 at page 4262, 4483 at page 6270 and 4350 at page 4261.

(Memorandum from J. E. Dean to W. J. Harte and F. C. Lake dated February 25, 1946, was received in evidence and marked "Government's Exhibit No. 4351.")

(Memorandum from E. A. Wight to B. Y. Bandy and P. A. Harbison dated February 28, 1946, was received in evidence and marked "Government's Exhibit No. 4483.")

(Memorandum from W. J. Harte to Field Office Managers dated March 8, 1946, was received in evidence and marked "Government's Exhibit No. 4350.")

6532 Mr. Roache. The first exhibit, 4351, is from J. F. Dean, Assistant Director of Sales for the Cellophane Division to W. J. Harte, Sales Manager in charge of Direct Sales, and F. C. Lake, Sales Manager in charge of Indirect Sales, in which Mr. Dean states that they have had no reports of Sylvania's activity with Saran coated cellophane since the war ended. He requests that Messsrs. Harte and Lake ask their field representatives to keep a sharp lookout for this competitive activity and get information regarding selling price, yield, and use for which this material is sold.

Exhibits 4483 and 4350 are memoranda to the Field Office asking that the men obtain the information requested by J. F. Dean.

The Government introduces into evidence Government Exhibit 4349 at page 4260. It is a memorandum from W. J. Harte, Sales Manager of Direct Sales to the Managers of the 7 Field Offices dated April 9, 1946, subject "Competition."

(Memorandum from W. J. Harte to Field Office Managers dated April 9, 1946, was received in evidence and marked "Government's Exhibit No. 4349.")

Mr. Roache. This memorandum requests that the Field Managers determine what Sylvania is telling the trade regarding its new capacity and when it will come in. It requests that the men in the field obtain this information in a subtle manner.

6533 The Government offers in evidence Government Exhibit 4239 at page 4080, a duPont memorandum from B. N. Jackson to C. F. Brown, J. E. Dean, W. J. Harte, E. C. Lake and L. B. Steele, dated February 19, 1946, subject "Reported Competition, Year 1945."

(Memorandum from B. N. Jackson to C. F. Brown, J. E. Dean, W. J. Harte, E. C. Lake and L. B. Steele, dated February 19, 1946, was received in evidence and marked "Government's Exhibit No. 4239.")

Mr. Roache. In this memorandum Mr. Jackson states that the duPont field force in reporting competition for 1945 accounted for 86.7 percent of Sylvania's MT sales and 67.4 percent of its estimated PT sales. Then he makes comparisons with former years, an extensive competitive summary for 1945, '44 and '43, a compilation of Sylvania's sales by territories, a compilation of indirect competitive reporting and final comments relative to various districts and accounts.

That concludes the exhibits in category 3.

We are now at paragraph 185 of the trial brief, index IV, 5, subhead b. This is the last category of exhibits under the main heading wherein the Government is showing that as an aid to perpetuating its monopoly position in the cellophane and caps and bands industry and to assist in anticipating developments detrimental to its dominance in said industry, duPont main-
6534 tained and utilized a constant surveillance of activities of the existing manufacturers and of potential competitors.

In this category No. 4, the Government will show that the defendant ferreted out information and kept a sharp watch for the emergence of competitive developments, whether in the form of improvements or new and potential competition which might jeopardize its dominant position.

The Government introduces into evidence Government Exhibit 4368 at page 4281, which is a memorandum from L. A. Yerkes, President, to the Board of Directors, Du Pont Cellophane Company, dated October 26, 1925.

(Memorandum from L. A. Yerkes to Board of Directors, Du Pont Cellophane Company, dated October 26, 1925, was received in evidence and marked "Government's Exhibit No. 4368.")

Mr. Roache. It reads:

"I have recently heard that two men named Snell and Hetzell, who claim to have been formerly employed in a Cellophane operation, are endeavoring to raise $1,000,000 for the construction of a Cellophane plant to be built in the State of Michigan.

"Unfortunately, this is absolutely all the information that I have been able to obtain up to this time.

"I feel it important enough to notify all the Directors of this fact so that if any further data can be obtained, they will
6535 let me have it immediately, as I believe it to be important to attempt to stop any manufacture of Cellophane through our patents in the beginning rather than after the construction of the plant has gotten well under way."

6536 I refer now to Government Exhibit 1453 at page 1941 already in evidence. It is a letter from B. M. May, Vice-President, DuPont Cellophane Company, to Rene Bernheim of Comptoir des Textiles Artificiels, dated April 10, 1930. Mr. May in writing relative to the activities of Wolff of Germany, which was a subsidiary of I. G. Farben, making cellophane. I will read the fourth paragraph: "Apparently the negotiations with the Skenandoa group have been terminated. This is welcome news in that my impression was that Wolff and Skenandoa had probably come to some final agreement. We do not see from our point of view any particular advantage of our making a tieup with Wolff on his non-moistureproof Transparit. How seriously do you take the statement that they have developed a new design of Transparit machine having a capacity of 2,000 kilos per day?"

The Government introduces into evidence Government Exhibit 4396 at page 4316, a letter from Mr. J. M. Quinn, Secretary to P. W. Pickard to Mr. B. M. May, Vice-President, DuPont Cellophane Company, dated August 5, 1930.

(The letter from J. M. Quinn to Mr. B. M. May dated August 5, 1930, was received in evidence and marked, "Government Exhibit No. 4396.")

Mr. Roache. It reads:

"Dear Mr. May: In order that your files on the Zeloid Products Corporation may be complete, I quote below letter received
6537 from C. H. Hudson, Manager, Providence Dyestuffs Office, dated July 21st.

"'The Zeloid Products Corporation, of Holyoke, Mass., has awarded a $10,000,000 financing contract to Austen P. Fox & Co., Inc.,

"'The Zeloid company manufacture a high grade and unusually perfect transparent paper for wrapping and other purposes and is known as Zeloid. This product is made by newly patented machinery and viscose processes from weed pulp, under several patents already allowed or issued, and under others still pending, all of them being the inventions of Dr. Charles Hetzel, president of the Zeloid Company, noted German-American chemist and engineer whose wide experience in the cellulose industry came to him from generations before him in Germany.

"'The Zeloid Company contracted for this $10,000,000 in financing for the purpose of equipping several plants for the manufacture of its Zeloid in order to cope with the demand for its products and will only be the beginning of plans for much larger operations.

" 'The bankers are not as yet determined whether it will offer these securities to the public or dispose of them privately.' "

The Government introduces into evidence Government Exhibit 4373 at page 4290. This is a letter from L. A. Yerkes to
6538 Mr. Walter S. Carpenter, Jr., Vice-President, E. I. Du Pont de Nemours & Company, dated October 9, 1930.

(The letter from L. A. Yerkes to Mr. Walter S. Carpenter Jr., dated October 9, 1930, was received in evidence and marked, "Government Exhibit No. 4373.")

Mr. ROACHE. It reads:

"DEAR WALTER: You have undoubtedly seen in the papers the last day or two the further announcement of Mr. Rivitz that the Industrial Rayon Company are contemplating going into the manufacture of Cellophane. I am enclosing a clipping from the Cleveland paper, in case you haven't seen this article.

"Whether this is a bluff or whether they are really seriously thinking of this is a question. We undoubtedly should consider what our own price policy should be with regard to this possible competition.

"I am going to be in Wilmington on Saturday morning and would like very much to go over this matter with you and Lammot if you think it advisable.

"Yours very truly, L. A. Y.

"I am also enclosing a Confidential Memorandum which I will talk with you about on Saturday."

The Government introduces into evidence Government Exhibit 4372 at page 4287.

6539 Mr. GESELL. Now, if your Honor please, we wish to have the same understanding with respect to these newspaper clipping that are coming along. We don't object to their coming into evidence if it is understood they are not offered in proof of the facts stated therein.

The COURT. I thought I ruled on that and sustained you.

Mr. GESELL. In another connection, your Honor, that has been the ruling, and I just wanted to state we have another case just like it here now.

The COURT. Very well.

Mr. ROACHE. It is the same situation.

The Government introduces into evidence Government Exhibit 4372 at page 4287, the first page of which is a confidential memorandum referred to in the preceding letter, referred to in the preceding memorandum from Mr. Yerkes to Mr. Carpenter. This memorandum is also dated October 9, 1930.

The COURT. I am not criticizing the evidence; I am not attempting to evaluate it. All I want to do is get a grasp of what it means as it comes into Court.

Mr. RENNINGER. Of course, it is unnecessary to show that anyone has been damaged thereby if these restrictive practices are present. Under the Robinson-Patman Act——

Mr. GESELL. We are litigating Section 2 of the Sherman Act, your Honor.

Mr. RENNINGER. I understand, your Honor. I stated in the beginning, your Honor, that these various restrictive practices we are trying to show were done with the intent to maintain their monopoly. It is also stated in our trial brief 6571 and our complaint has so stated that these various restrictive practices, some are legal in themselves and some are illegal in themselves.

Relative to the Robinson-Patman Act that Mr. Gesell seems to so perturbed about, at this stage of the game I would like to state that as to converters we are not contending that the quantity discount provision granted to them violated the Robinson-Patman Act. I might state that the Robinson-Patman amendment to the Clayton Act was passed in 1936. DuPont in the latter part of 1938 and beginning in 1939 changed these quantity discount provisions with its converters. We are not making any contention that the two years was an unreasonable length of time in which to change their quantity discount provision.

* * * * *

6593 The COURT. Well, it seems to me your objection goes to the weight I am to give to this evidence. I don't see how it calls for a ruling on my part at this moment that it should be excluded entirely, or is that your objection?

Mr. GESELL. No, I am simply rising again to point out the great difference between the theory and the proof.

The COURT. I have your point in mind.

Mr. RENNINGER. The Government moves into evidence Government Exhibit 5055 at page 4590, a memorandum from E. C. Lake to O. F. Benz dated April 5, 1940.

(The memorandum from E. C. Lake to O. F. Bentz dated April 5, 1940, was received in evidence and marked, "Government Exhibit No. 5055.")

Mr. RENNINGER. I will not read this exhibit. It just describes the expenditures for the advertising allowance that DuPont was subject to under the terms of its agreements.

The Government moves into evidence Government Exhibit 5542. This is a letter from Mr. J. E. Hatt to Mr. William Heller, Vice-President of Milprint, dated February 5, 1941.

(The confidential memorandum dated October 9, 1930, was received in evidence and marked, "Government Exhibit No. 4372.")

Mr. Roache. The confidential memorandum reads:

"In an interview yesterday with Hiram Rivitz, President of Industrial Rayon, Marks of the Daily News Record was told that Industrial Rayon is erecting 1,000,000 pounds additional rayon
capacity at the Cleveland plant and is going into the manu-
6540 ture of transparent wrapping material either at Cleveland
or Covington, probably the latter location. Rivitz was quite cynical in his comments regarding competition in the rayon industry, claiming his investment, manufacturing costs and overhead were less than other leading factors in the industry, which enables him to sell his capacity output at a profit.

"When asked if he had considered du Pont Cellophane moistureproof patents before deciding to enter the Cellophane field, he said, 'Yes', and that they have a process just as good as du Pont and had figured that if du Pont with its list of yacht owners could make a profit out of Cellophane, it must be a good business, especially when gaged by his experience in competing with du Pont in rayon. He further stated that they have learned a great deal about Cellophane through the Covington plant manager, a man by name of Dasher, a mechanical engineer, formerly with Caps-Viscose."

The Court. May I note for the purpose of the record historically that we have admitted 38 exhibits in exactly 30 minutes.

Mr. Gesell. Just perhaps as a diversion, there is a hand-written note that appears after he refers to du Pont's list of yacht owners: "Must mean you, Mots and Fin."

Mr. Roache. The Government introduces into evidence Government Exhibit 4376 at page 4293. It is a letter from B. M. May,
Vice-President, to Mr. T. E. Doremus, Vice-President,
6541 The Grasselli Chemical Company, Cleveland, Ohio, dated
May 26, 1931.

(The letter from B. M. May to T. E. Doremus dated May 26, 1931, was received in evidence and marked, "Government Exhibit No. 4376.")

Mr. Roache. It reads:

"Dear Ted: You wrote us some time ago that Murphy of Industrial told you that the latter was going into the manufacture of a transparent sheeting somewhat similar to Cellophane. I have heard the rumor that they have given up any further attempts to perfect the product which they were endeavoring to make. Have you any information as to their present position and whether they have decided to discontinue?

"Yours very truly,

B. M. May."

(The letter from J. E. Hatt to Mr. William Heller, dated February 5, 1941, was received in evidence and marked, "Government Exhibit No. 5542.")

Mr. RENNINGER. Mr. Heller of Milprint had evidently asked
that converters' field representatives be included in com-
6594 puting the advertising allowance.

Mr. GESELL. That letter is not offered, your Honor, and we have surmises as to what Mr. Heller said. This is the reply to Mr. Heller's letter. They don't offer Mr. Heller's letter. I don't think it is proper to surmise as to what Mr. Heller said. That is again theory, and not proof.

Mr. RENNINGER. From the contents of the letter it is fairly obvious. I can read the whole letter if your Honor desires. It is a three-page letter. I am just trying to explain the reason why DuPont answered the way they did.

The COURT. What was the language which precipitated this discussion?

(The Reporter read the following:)

"Mr. RENNINGER. Mr. Heller of Milprint had evidently asked that converters' field representatives be included in computing the advertising allowance."

The COURT. Where do you gather that conclusion, from the document before you?

Mr. RENNINGER. Yes, from the document before me. I can strike that and just read the parts of the letter that I wish to read. I don't see where it is worthwhile reading the whole letter.

The COURT. Yes, follow the latter course.

6595 Mr. RENNINGER. Starting from the second paragraph of
the letter, I will just read part of the letter:

"I am quite interested in your point of view on this matter and I am sorry that you don't feel that our plan is equitable to all converters.

"We very definitely think it is wholly fair and is the result of considerable thought as to the method in which we might compensate for unusual advertising effort, in part, with those of you who are soliciting sales from the same type of trade generally, to whom we market our material.

"Perhaps primary selling, sales promotion and specialized advertising are all directed at the same end but they are not subjects that can be given equal importance, equal pressure or even equal expense in all cases and by and with various concerns, all generally offering materials in the same market but in which there are many diversified directions.

"The only valid reason that we have for giving converters a discount from our established price list, is to partially reimburse

The Government introduces into evidence Government Exhibit 4375 at page 4292. This is a letter from T. E. Doremus, Grasselli Chemical Company, to B. M. May, DuPont Cellophane Company, dated May 28, 1931.

(The letter from T. E. Doremus to B. M. May dated May 28, 1931, was received in evidence and marked, "Government Exhibit No. 4375.")

Mr. ROACHE. It reads:

"MY DEAR BEN: I will try to get hold of Murphy in the 6542 next few days and get the last information available on the Industrial activities as regards Cellophane. He is out of town at present and I may not be able to catch him until next week."

The Government introduces into evidence Government Exhibit 4374 at page 4291, a letter from Mr. T. E. Doremus of Grasselli Chemical Company to B. M. May, Vice-President, DuPont Cellophane Company, dated Cleveland, Ohio, June 1, 1931.

(The letter from T. E. Doremus to B. M. May dated June 1, 1931, was received in evidence and marked, "Government Exhibit No. 4374.")

Mr. ROACHE. Mr. Doremus reports his visit with Arthur Murphy who told him Industrial Rayon had not given up the thought of manufacturing cellophane, but as yet they had not bought machinery and have no definite plans.

The Government introduces into evidence——

Mr. GESELL. It also says there wasn't any truth in the newspaper story. It doesn't say they had no definite plan; they were doing nothing at present and had no plans.

Mr. ROACHE. I will accept that.

The Government introduces into evidence Government Exhibit 4377 at page 4294, a letter from T. E. Doremus of Grasselli Chemical Company to Mr. B. M. May, Vice-President, DuPont Rayon Company, dated August 10, 1931.

(The letter from T. E. Doremus to B. M. May dated August 10, 1931, was received in evidence and marked, "Government Exhibit No. 4377.") 6543

Mr. ROACHE. Attached to the letter is a clipping from the Cleveland News telling of Industrial Rayon's intent to manufacture cellophane, but Mr. Doremus reports in his letter that Murphy told him the story was premature.

The Government introduces into evidence Government Exhibit 4378 at page 4296.

Mr. GESELL. I think, your Honor, I just should note that I don't think that statement is a complete representation of what 4377 states. "* * * there is no particular activity on their part in the production of a cellophane type of paper." That is what the document says.

Mr. Roache. That is in substance what I said, that it was premature, they weren't doing anything about it.

The Government offers into evidence Government Exhibit 4378 at page 4296, a letter from F. A. Wardenburg, General Manager, to Mr. L. A. Yerkes, President, DuPont Rayon Company, dated January 27, 1932.

(The letter from F. A. Wardenburg to L. A. Yerkes dated January 27, 1932, was received in evidence and marked, "Government Exhibit No. 4378.")

Mr. Roache. Mr. Wardenburg tells that he heard that Eastman Kodak, Sylvania, Union Carbide & Carbon and Riegal are planning to put a competitive cellophane material on the market.

Mr. Gesell. That is not what the document says. It
6544 says, "* * * are planning to put on the market a material
in competition with cellophane," which is a wholly different thing than saying a competitive cellophane material.

Mr. Minicus. I would like to point out to your Honor again that this is 1932 during the period in which DuPont was very strenuously protecting its trade-mark value for cellophane.

Mr. Gesell. But this relates to another flexible packaging material.

Mr. Roache. It does not say so.

Mr. Minicus. I see nothing on the face of the exhibit.

The Court. I think there is enough on the record to act as a caveat to me when I come to read it.

Mr. Roache. I refer now to Government Exhibit 4176 at page 3969 already in evidence, which is a letter from L. A. Yerkes to Mr. F. A. Wardenburg, General Manager, Ammonia Department, E. I. du Pont de Nemours & Company, Wilmington, Delaware, dated November 19, 1931. It reads:

"Thanks for your note of the 16th. Since I spoke to you we have found out that our information was a little premature. We believe now that they have nothing more than a very small laboratory machine, which is quite different from the original information that I had. Even this laboratory machine is probably not in Charleston.

"However, if any excitement occurs during the next few
months, I think it would be well if Mr. Clough just kept his
6545 eyes and ears open, which I know he will do."

I refer now to Government Exhibit 4381 at page 4299 already in evidence. It is a letter from Lammot du Pont, President, E. I. du Pont de Nemours & Company, to L. A. Yerkes, President, DuPont Cellophane Company, dated December 2, 1931. It is

Mr. Lammot du Pont's report to Mr. Yerkes of his visit with Mr. Jesse Ricks of the Union Carbide & Carbon Corporation, at which time he obtained information of Carbide's plans relative to the manufacture of cellophane.

Mr. Gesell. It says "transparent wrapping material similar to cellophane." Now, your Honor, I must interject on these cases because the documents do not say what is being represented.

Mr. Roache. The first paragraph of the letter says, "Yesterday I called on Mr. Jesse Ricks of the Union Carbide & Carbon Corporation, and had about an hour's talk with him and Mr. Barrett, regarding their proposed entry into the cellophane field."

Mr. Gesell. It says that they stated that they had rights for a process for the manufacture of a transparent wrapping material similar to cellophane.

Mr. Roache. This is the same situation, your Honor, we discussed in the Carbide & Carbon situation wherein we showed that DuPont kept after Union Carbide & Carbon Company relative to their proposed entry with a material which DuPont
6546 felt was cellophane. After they discovered it was not cellophane they did not bother with the subject any more, and this is the same letter we read before which I just summarized.

I refer now to Government Exhibit 4179 at page 3973. This is a letter from L. A. Yerkes to Dr. Ernest B. Benger, General Assistant Director, Chemical Department, dated January 7, 1932.

The Court. For the purposes of the record, you say you are referring to 4179. Do you offer it in evidence?

Mr. Roache. It is already in evidence.

The Court. Oh, it is already in?

Mr. Roache. When I refer to it it is already in. I should have said it is already in.

It states that a check of Carbon & Carbide Corporation's product shows it to be regenerated cellulose.

I refer to Government Exhibit 4181 at page 3975, already in evidence, which is a letter from E. K. Bolton to Mr. L. A. Yerkes dated January 18, 1932, wherein Dr. Bolton reports information received in a conversation with Dr. Davidson of Carbide & Carbon.

The Government introduces into evidence Government Exhibit 4386 at page 4306. This is a DuPont memorandum from C. R. Estabrook to W. J. Harte dated 2-27-41, subject "Competition."

(The memorandum from C. R. Estabrook to W. J. Harte dated February 27, 1941, was received in evidence and
6547 marked, "Government Exhibit No. 4386.")

Mr. Roache. It reads:

"There is a rumor circulating that one of the rayon concerns, with a plant near Louisville, plans to make transparent sheeting.

The American Rayon Company is only name mentioned. Do not know source of rumor nor any details. Am on lookout for further information. Probably the same rumor is circulating in other sections."

The Government offers into evidence Government Exhibit 4356 at page 4268, a DuPont memorandum from A. F. Wendler to Dr. G. M. Karns dated October 5, 1943, subject "Saran-Coated Flameproof Cellophane."

(The memorandum from A. F. Wendler to Dr. G. M. Karns dated October 5, 1943, was received in evidence and marked, "Government Exhibit No. 4356.")

Mr. Roache. The first part of the first paragraph states:

"In one of our recent contacts with U. S. Ordnance Sections, we developed information to the effect that Sylvania and Dow Chemical have gotten together on a Saran-coated flameproof Cellophane."

Then follows the chemical analysis of it, and the last two paragraphs:

> "It is thought that you would be interested in this information, particularly since it involves a Saran coating on
> 6548 Cellophane, and that Dow has been working with Sylvania on this problem.

"The above is forwarded you for such consideration or investigation as you may care to give it."

The Government offers into evidence Government Exhibit 4357 at page 4269. It is a duPont memorandum from E. C. Lake to T. K. Woods, Wyoming, Ohio, dated January 5, 1944, subject "Sylvania's Low Priced Ordnance Film."

(The memorandum from E. C. Lake to T. K. Woods dated January 5, 1944, was received in evidence and marked "Government Exhibit No. 4357.")

Mr. Roache. In this memorandum Mr. Lake discusses the results of tests made on a new film of Sylvania and states at the end of the memorandum—and I will read starting with the fourth paragraph:

"Your best direction is to keep your ear to the ground for anyone of ordnance wrap manufacturers who have bought uncoated material from our competitor. When you hear of one, inform us promptly, with as much details as possible—quantity, kind, finished samples, etc."

The Government introduces into evidence Government Exhibit 4358 at page 4270, a duPont confidential memorandum from R. M. Horsey, Director of Development Section, Technical Division, Rayon Department, to Dr. E. B. Benger, General Assistant Manager, Technical Division, Rayon Department, dated
6549 September 2, 1943, subject "Saran."

(The memorandum from R. M. Horsey to Dr. E. B. Benger dated September 2, 1943, was received in evidence and marked, "Government Exhibit No. 4358.")

Mr. ROACHE. The exhibit contains a report of the information that this writer obtained from Mr. Shoemaker of the Dow Chemical Company on the work that the Dow Chemical Company was doing for Sylvania Industrial Company on Saran as a moistureproof coating on cellophane.

Mr. GESELL. I think the record should show in that connection the interest of the Picatinny Arsenal in this venture at the time of the war.

Mr. ROACHE. The Government introduces into evidence Government Exhibit 4359 at page 4271, a confidential letter from G. M. Karns, Cellophane Research, to J. E. Hatt, Manager, and T. L. Hines, Assistant Manager, Cellophane Division, dated September 4, 1943, subject "Saran."

(The letter from G. M. Karns to J. E. Hatt and T. L. Hines dated September 4, 1943, was received in evidence and marked, "Government Exhibit No. 4359.")

Mr. ROACHE. The first paragraph states:

"Information on Dow's activities and Sylvania's interest in Saran, contained in Mr. Horsey's letter of September 2nd to Dr. Benger, copy of which you have received, is an interesting outgrowth of Development Section's contacts with Dow
6550 over the past several months."

The Government offers into evidence Government Exhibit 4391 at page 4311, a letter from T. F. Dolan, President of Dobeckmun Company, Cleveland, Ohio, to Mr. E. C. Lake, dated October 16, 1944.

(The letter from T. F. Dolan to E. C. Lake dated October 16, 1944, was received in evidence and marked, "Government Exhibit No. 4391.")

Mr. ROACHE. It reads:

"The enclosed letter is self-explanatory.

"If you have any interest in my checking into this, please 'phone me. In either case, please return the letter to me for reply.

"With best regards, I am

"Cordially yours."

The Government introduces into evidence Government Exhibit 4392 at page 4312. This is the enclosed letter referred to in the preceding letter.

Mr. GESELL. With respect to this, your Honor, we have no objection to its admission if it is understood that these hearsay statements are not offered for proof of the facts. This is a letter by somebody named Kahn to the Dobeckmun Company, and since it came to duPont's attention I think there is no reason why it should not be admitted if it is understood, however, that the facts stated therein are not offered as true.

6551 The COURT. The Court will so rule. Then the basis of your hearsay objection will be sustained.

(The letter from R. B. Kahn to the Dobeckmun Company dated October 12, 1944, was received in evidence and marked, "Government Exhibit No. 4392.")

Mr. ROACHE. It reads:

"GENTLEMEN: I am authorized to sell a complete plant for the manufacture of transparent sheeting (cellophane).

"My clients proposal includes the dismantling of their equipment, crating same for shipment, and the re-erection of this apparatus on a site of the purchasers choice, and operating this plant in the purchasers interest until commercially acceptable merchandise and continuous operation has been achieved. The sale price designated below includes the reassignment of their patents to the purchaser, together with the transfer of the 'know how' with full instructions for the commercial operation of this plant both in writing and by way of demonstration, and including their complete records of runs from approximately 12 years of operation, as well as the many special formulations they developed, and which have met with sales acceptance.

"Client advises me they have spent $250,000.00 for the development of the business.

"Their sales price has been set at $65,000.00 delivered and operating, subject to prior sale.

6552 "Or in lieu of cash, I believe they would consider accepting shares in your company for their plant.

"If you are interested in looking into this situation, please write for further details."

6553 The Government introduces into evidence Government Exhibit 4393 at page 4313. This is a letter from E. C. Lake, Du Pont Cellophane Sales Manager, to Mr. T. F. Dolan, the Dobeckmun Company, dated October 27, 1944.

(Letter from E. C. Lake to T. F. Dolan dated October 27, 1944, was received in evidence and marked "Government's Exhibit No. 4393.")

Mr. ROACHE. It reads:

"DEAR TOM: Many thanks for your courtesy and thoughtfulness in sending along the original letter from R. B. Kahn of Kansas City on the plant he has for sale for manufacturing transparent sheeting. I am returning the original letter, herewith, as you requested.

"Obviously, we are interested in finding out more about this matter. Would it be possible for you to find out the type of film produced and to get a sample of the film if it is available? We would also like to know the maximum width of the film produced, the daily production in pounds and where can it be inspected.

"Any information you can get along the above lines will be greatly appreciated."

The Government offers into evidence Government Exhibit 4484 at page 6271, which is a memorandum from E. A. Wight to D. K. Shoop, dated June 14, 1944, subject "Competition."

6554 (Memorandum from E. A. Wight to D. K. Shoop dated June 14, 1944, was received in evidence and marked "Government's Exhibit No. 4484.")

Mr. ROACHE. In this memorandum the writer asks Mr. Shoop to check into the rumor that Sylvania was going to have a plant in Oregon.

That, your Honor, ends category 4 wherein it has been shown that the defendant's activities in ferreting out information and closely watching and checking for the emergence of competitive developments apt to jeopardize its dominant position in the industry.

The Government believes, your Honor, that although these activities just presented, these activities of the defendant proven by the evidence in the four divisions of the main contention, may not of themselves taken separately be a violation of the Sherman Act, still they are a part of the general pattern of the defendant's conduct and thereby they disclose the intent of the defendant to monopolize and to maintain its position in the cellophane and caps and bands industry. And this particular statement was so held by Judge Forman in a similar situation in U. S. v. General Electric Company, 82 F. Supp. 901.

Mr. GESELL. If your Honor please, I think here again there is a very wide gap between the Government's claims and its proof.

6555 We were charged with using devious means and when questioned about that it turned out that that word "devious" meant various means. We are also charged with abnormal surveillance, but there is no direct proof of any abnormality in this group of documents showing as it does intense competition. This is simply the ordinary conduct of a business man, which the Government concedes is lawful, for the purpose of sharpening competition, to use the language of some of the cases. There is no direct proof here of any abnormality, just as there is no proof of deviousness, and to use words like "ferreting out information" when the only document presented on the ferreting charge is that we replied to a letter that somebody wrote us saying that they knew someone who had a cellophane plant for sale is again simply to emphasize the wide gap between the claims and the proof.

Then we are charged with getting confidential competitive information. Under this charge of spying and getting confidential competitive information one would expect that what was meant was that there was some system of espionage by which trade secrets of competitors were obtained, but that is not what the documents show. They simply show we bought in the market competitive materials and analyzed them, or we tried to find out if they were building a plant by talking to people in the locality, or if they made disturbing gains in competition on the West Coast,
we wrote to our salesmen and said, "What is going on?
6556 They are getting a lot of business away from us." There
is nothing devious, there is nothing abnormal, there is nothing confidential, and there is no ferreting. This is simply natural business conduct, and it seems to me that the only possible issue that it tenders here is the issue that Mr. Roache finally winded up on. He said it showed an intent to perpetuate the position of duPont, an intent to anticipate developments detrimental to dominance and, as they say in their trial brief, discloses a manifestation of monopoly.

Let us look at the documents then from the point of view of intent which, it would seem to me, is the only real worth, if any, they have in the case. What indications of intent do we get? We don't get many because most of it is just routine business conduct, but we do get some. Exhibit 4303, for example, says that under the L-20 order we were required to get information on end uses and that L-20 has now been discontinued and the men in the field are requested to continue, however, to get end use material, and the question comes, why are we seeking it? That is the intent. They say, because it is useful in determining advertising quotas and the effectiveness of advertising. Well, is that a monopolistic purpose of some kind? Or is that a good sensible business purpose?

Who is buying the product? We want to know, in order that we can know where to advertise, and if we advertise in a particular place and the sales don't reflect the advertising, then we
want to know why wasn't the advertising effective.
6557 4336, another one of these so-called spying documents,
relates to some indication of intent. But what is it? We refer to disturbing gains by competition on the West Coast in 1942, and we want to find out why.

Then let's take one of the sample cases, which is the next of these four theoretical categories that have been set up here. 4305, we want to get a particular sample. Why? Because we want to see if we can match the other fellow's products. There was competition here as to quality, as to research, and naturally we wanted to keep abreast of what the other fellow was doing, and I am certain your Honor hasn't any doubt that the other fellows were picking up our goods and trying to keep abreast of us, and it is pleasing to see that some of these documents show that duPont's quality was superior, which is one of the very reasons we say it sold more goods.

4307, we want samples to improve quality.

4312, we want a sample to find out if the other fellow has a better softener.

4314, we want a sample to find out if a competitor is infringing a patent or illegally violating a Government order.

None of that is anything but legitimate business purpose underlying this line of inquiry.

And on it, your Honor, I feel there is one other statement 6558 that I must make which I hope does not transgress your Honor's ruling, but there is in the possession of the Government, and initially in their documents, substantial proof of the same type of activity directed not alone to cellophane but directed to all of the various flexible packaging materials. There is one document here that gives us some indication of that in 4309; and I think these documents should not come in under the impression that it was only as to cellophane that this so-called surveillance took place. This was a surveillance of the entire field of flexible packaging material.

Now, to deal with some of these specific situations which come up in the last section concerned with emergence of competition. Most of the documents pertain to Snell and Hetzell and the Zeloid Products Company, which are one and the same thing. The financing there apparently did not go through. We made inquiries to find out what was going to happen. There is no proof that we did anything to prevent them from going forward.

Wolff, the same thing. We never bought their process.

As far as Shenandoah is concerned, it is clear in the evidence we have seen that Shenandoah lost interest at the time of the market crash.

Industrial Rayon, the situation that involved all these clippings, did not even involve cellophane. It is our understanding it involved a different product, glycol cellulose.

6559 Mr. Minicus. I would like to note for the record it is the Government's understanding that that did involve cellophane.

Mr. Gesell. All I can say is that there is no proof that it did.

Mr. Minicus. It was called cellophane in the documents we put in, your Honor.

Mr. Gesell. It was not, and it is not cellophane.

Riegal, we know is not cellophane because the record does give us a glimpse of that. They were making a moistureproof glassine, for which they paid royalties to duPont.

In none of these cases was there in my judgment any more than the normal curiosity of a business man concerning competitive developments. There is no proof of any action taken to thwart the emergence of competition, and simply these are the regular rather unsystematic heterogeneous documents that have been collected from the files showing that tidbits of information came in from time to time and that duPont naturally expressed an interest in them.

So I conclude with what I started to say by saying that there is no proof of any illegal or monopolistic intent, certainly no proof of illegality, and that this is all routine normal business conduct showing intense competition.

Mr. Roache. First, your Honor, I would like to make a comment in regard to what Mr. Gesell stated, that duPonts's film
was superior, that the documents so showed. If we look
6560 at document 4307, the second paragraph, it states: "You
will notice that in some instances our standard L. A. T. film and the modified L. A. T. film are both inferior to Sylvania's P. M. B.-2 film."

Your Honor, it does not make any difference if finally it turns out that these various companies were not making cellophane. We were not trying to show that they actually did or were making cellophane. It was pointing out duPont's vigilance attempting to discover new and potential competition. That is what I am pointing out. If in the beginning they thought it was, it still showed they were vigilant——

The Court. Competition with respect to what, Mr. Roache, substitute materials?

Mr. Roache. Cellophane, cellulose film. I am not referring to substitute material. I am saying if eventually it turned out that it was one of those things, it makes no difference as far as what we are trying to show here. We are trying to show that in the beginning they thought it might be cellophane, and that is what they were after and that is what they kept an eye on. If later it turned out to be something else, that does not make any difference.

I would also like to point out that this is an activity of a monopolist, your Honor; this is not the activity of one of several com-
panies engaging in competition with five or six other com-
6561 panies. This is an action of a monopolist, and it is not
sharpening competition. Being the action of a monopolist it is an action intending to increase or maintain his monopoly and not to sharpen the competition at all.

One other point, in reading that last category, I would like to call the Court's attention to the fact that most of these documents were around the years 1931 and '32 and '30, and if the Court will recall when I was putting in the section relative to price reductions aimed at potential competition, it all comes in just around that time. For instance, these documents already having been put in in the price reduction, 346, 462, 463, 467, 4182, are all around that time showing duPont's policy to reduce prices aimed at potential competition. Here is the competition maybe they were talking about.

Well, your Honor, that concludes Section 4 of the Government's presentation wherein evidence was introduced discussing duPont's intent to monopolize by its surveillance of the industry, its relations with Carbide & Carbon, by its successful attempts to raise the import duty on cellophane, the inducement of a breach of contract, and by its policy of price reductions aimed at potential competition. Of importance were the exhibits proving the exclusion of I. F. Schnier & Company and Armstrong Cork from the manufacture of cellulose caps and bands, and the exclusion of the American Viscose Company, Rayonier, Inc., and the Visking
Corporation from the manufacture of cellophane, which ex-
6562 clusions have been condemned by the Courts at least as
early as 1893, in U. S. v. Patterson, 59 Fed. 283, and then down through the years, the recent case being U. S. v. General Electric, 82 F. Supp. 891, wherein all these practices of exclusion were condemned.

Section 4, your Honor, was presented not only to show duPont's intent to monopolize this industry by various suppressive and exclusionary acts but also to show by these acts that this monopoly was not thrust upon this company but was actively sought and actually obtained by this defendant.

Mr. Renninger. If your Honor please, we now come to the last phase of the Government's case, in which the Government alleges that the defendant's power to regulate the distribution of cellophane and caps and bands whereby marketing outlets were monopolized and purchasers of these products were subjected to discriminatory and unfair sales practices reflect duPont's intent to maintain and strengthen its market control.

As the Government stated in VII of its trial brief, paragraph 192, the domination and control of the principal marketing outlets for cellophane and caps and bands were designedly maintained by the defendant through recourse to unfair competitive practices in both its indirect and its direct sales.

As was pointed out earlier in the case, cellophane is sold by two
principal methods. The first is what is known as direct
6563 sales, whereby a salesman for the manufacturer would go out

into the country and contact directly the purchasers and users of cellophane, who purchased the cellophane from the manufacturer, for the purpose of wrapping their particular commodity.

Cellophane is also sold by what is known as indirect sales. Here the manufacturer in most instances sells to some person who is usually going to do something to the cellophane before he in turn sells it to the ultimate consumer. Under this phase of the case we will first take up a discussion of the indirect sales outlets, which is found in the outline V, Section 2. We will start out with the indirect sales.

As was stated in paragraph 194 of the Government's trial brief, indirect sales of cellophane and caps and bands were made subject to restrictive understandings and agreements designed to maintain duPont as a dominant source of supply to buyers for resale who lacking adequate alternative sources were induced to comply therewith.

Under indirect sales cellophane is sold through converters, fabricators, industrial users, and also through agents and jobbers. As has been more fully discussed previously, a converter, generally speaking, although it is almost impossible to get an adequate definition of a converter, a converter is an individual who takes cellophane and does something to that cellophane, such as making it into a bag or a tube or a roll, before selling it to the ultimate consumer.

6564 Government Exhibit 5047, which was discussed previously, described the manner in which duPont selected its converters. It is the Government's contention that duPont has always pursued a selective policy with regard to converters, and that the defendant, although it controlled in excess of 75 percent of the total supply of cellophane, sold only to a select group of converters for cellophane. This exhibit, that is, Government Exhibit 5047, which was a memorandum from C. F. Brown dated April 28, 1941, first states that there are two methods of distribution. First there is a selective method, and second there is a wide open policy, and that duPont has always chosen the selective method. The document goes on to state that as of that time duPont had 15 exclusive promotional converters, including the recognized leaders, 10 who buy from duPont exclusively and 11 two-source converters. Sylvania, on the other hand, had only one large converter, one medium sized converter, and eighteen very small converters totalling less than one-fourth of duPont's volume. This exhibit goes on to state, and I quote, "As a result of a selective policy, our position in the converting field is strong." This is found on page 4561. And again on page 4567, "By keeping the number of converters relatively small, but entirely adequate to meet our needs, with constant selective increase, we continually build value into our franchise and strengthen our position in respect to establishment of new converters as we require them."

6565 This document goes on to state that even if DuPont were to lose ten per cent of their business with their promotional converters alone they would have a hard time making it up from Sylvania sales. The document states that omitting Daniels and Crystaltube, all the balance together of Sylvania's sales would not total more than one-half of that figure.

As we have stated, DuPont has classified its converters into three main headings: One, those converters who were bound to DuPont to buy their entire requirements of cellophane from DuPont and are signed up on what it designates as a promotional converter agreement; second, a converter that buys all of his requirements from DuPont but who has not signed the promotional converter agreement; and, three, the two-source converters; that is, those converters who purchase cellophane from both DuPont and Sylvania.

As we have seen from this same exhibit 5046, DuPont's promotional converters represented by far the most important group of converters in the cellophane industry. From this exhibit we can see that three of DuPont's promotional converters in 1940 consumed more cellophane than all of Sylvania's hundred per cent converters.

Government Exhibit 414 already in evidence sets forth the number of Sylvania's converters for the years 1935, 1940, and 1945.

6566 Although the actual number of converters sold by Sylvania as contained in this exhibit indicates that Sylvania has almost as many converters as DuPont, we have seen from these previous exhibits that DuPont was able to keep the most important converters as distributors of its own cellophane. The question then arises How was DuPont able to keep the bulk of the converter business to itself and why was Sylvania not able to break into this business to any great extent? It is the Government's contention that DuPont has been able to monopolize the marketing outlets and has been able to engross the most effective and most desirable distributors of cellophane by various restrictive and discriminatory practices. It was not just happenstance.

It is also the Government's contention that these practices reflect DuPont's intent to maintain and strengthen its monopoly control and arose out of a deliberate attempt on its part to channel all important converter sales to itself by various practices, many of which are illegal in themselves.

As the Supreme Court stated in United States versus Griffith. "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain competitive advantage, or to destroy a competitor is unlawful."

Prior to 1939, as we shall see from the exhibits that the Government will now introduce into evidence, DuPont granted to its converters and to others certain quantity discounts based upon the volume of their purchases of cellophane for conversion purposes. The more cellophane that a converter purchased, the greater percentage discount from list price that he would
6567 receive. This discount increased from the three per cent allowed to all converters to as high as ten per cent for larger quantities. It is the Government's contention that this procedure had a direct result of channeling all purchases by the leading converters to DuPont, although the Government does not stress the fact that this quantity discount granted to converters at this time may have violated the Robinson-Patman amendment to the Clayton Act. Nevertheless, the Government does content that this was one of the methods used by DuPont to exercise control over the converters and channel all the principal indirect sales of cellophane to DuPont. It can readily be seen that a converter would want to obtain the greatest discount possible, and to do so he would naturally buy all his requirements from DuPont in order to get the maximum discount possible.

Mr. **Gesell.** Why so, if I may interpose, your Honor? So that I can understand these contentions, is it the Government's contention that the same discounts were not offered by Sylvania?

Mr. **Renninger.** No, it is not. The question is that Sylvania is unable to service the field completely itself, so the bigger converters in order to get their full supply of cellophane bought from DuPont, and the more they bought they would naturally keep on buying from DuPont because the quantity discount that they received would increase along with their purchases.

6568 Mr. **Gesell.** What is the Government's position, if your Honor please, as to why they did not buy from Sylvania to get the same discount?

Mr. **Minicus.** It is the Government's position that at the time Mr. Renninger is speaking of, prior to 1939, Sylvania was not engaging in a guarantee against loss or indemnification on these quantity discounts.

Mr. **Gesell.** That is not the question I asked. I asked Did not Sylvania have the same discount system?

I am sorry, your Honor——

The **Court.** No, it sharpens the issue for me. I don't know what I can do about it. I can't answer and give you the theory of the Government's case.

Mr. **Renninger.** Irrespective of whether they did—in all probbility they probably did, because they had to, but the Govern- ient's contention is that these big converters could not buy all of heir requirements—that is, the whole group of them could not uy all their requirements from Sylvania. Sylvania did not have he facilities to supply them all.

Mr. Gesell. Is there evidence to be offered on that? Is there ny evidence as to their capacity to deal with the converters in uantities? There is nothing in these documents on that.

Mr. Renninger. There is already in evidence the amount of Sylvania's sales to its direct users and to its indirect
569 users for all the various years.

Mr. Gesell. The other question, your Honor, to sharpen he issue, that I would like to ask is this: Mr. Renninger said the iovernment was not stressing at this time the question of whether hese discounts violated the Robinson-Patman Act or not. I hink we would like to have it. Is it charged that they did violate t or is it charged that they did not? If it is charged that they lid, we would like to know at some stage here in what respect hese converter quantity discounts are said to violate the Robinson- 'atman Act.

Mr. Renninger. I am speaking solely of converters at this time.

The Court. Do you propose, Mr. Renninger, simply to show he quantity purchased by a particular converter and the discount hat DuPont gave to him and then stopped, or are you going to how that evidence in relation to the effect it had, in fact, on lecreased sales by the competitor, for example, Sylvania?

Mr. Renninger. No.

The Court. In other words, are you going to show the Court or s it your plan to show the Court the effect of these discounts or are 'ou just going to put that evidence in by itself and argue in vacuo vhat effect it might have had? In other words, am I going to deal with the ultimate fact of actual restriction of competition or
570 am I going to deal with theoretical values?

Mr. Renninger. We are not going to show any actual estriction of Sylvania itself in reference to their productions and ales.

The Court. That is the point Mr. Gesell is making. He wanted o be in a position to better understand this particular proof that s coming in, because he wants to keep his eye on the ball to see vhere it is going to lead him.

Now, as I understand it, we are simply going to deal, as I said n the beginning of this colloquy, with particular quantities purhased by particular converters and the particular amount of iscount given in each or several instances?

Mr. Renninger. That is correct.

The Government moves into evidence Government Exhibit 5374. This is a letter from E. C. Lake to Mr. M. T. Heller, President of Milprint, dated April 22, 1942.

(Letter from E. C. Lake to M. T. Heller, dated Apr. 22, 1942, was received in evidence and marked "Government's Exhibit No. 5374.")

Mr. **Renninger**. This shows the adoption by duPont of a new standard cellophane label. The fifth paragraph reads: "As in the past the use of this new standard label is exclusive with us and various manufacturers of products made exclusively with duPont Cellophane."

The Government moves into evidence Government Exhibit 5385, letter from Mr. B. C. Robbins of duPont to Mr. T. F. Finerty, Zellerbach Paper Company, dated November 14, 1944.

(Letter from B. C. Robbins to T. F. Finerty dated November 14, 1944, was received in evidence and marked "Govern-
6627 ment's Exhibit No. 5385.")

Mr. **Renninger**. It reads: "Referring to our discussion and recommendations in Wilmington that you incorporate the standard label on the envelope of frozen food bags and cartons, we attach a copy of our Post War Locker Plant Manual which you may have seen previously.

"On the inside-back-cover, we have used the label as a means of impressing our brand of film on this comparatively new industry, a tie-up we think of help to those marketing materials made of our film to this field."

As stated previously, during the period of war-time shortages the promotional converter occasionally had to break away from buying its entire requirements from duPont. Government Exhibit 5379, which the Government now moves into evidence, is an example.

(Letter from Regent Tube & Bag Company to E. I. DuPont de Nemours & Company dated February 19, 1946, was received in evidence and marked "Government's Exhibit No. 5379.")

Mr. **Renninger**. Here again we see the importance of the Du Pont standard cellophane label and the fact that only a promotional converter could use this label. This exhibit 5379 is a letter from George M. Burkhart, of the Regent Tube & Bag Company, to E. I. duPont de Nemours & Company, dated February 19, 1946. It reads:

6628 "Gentlemen:

"On repeated occasions, we have tried to procure sufficient film for our requirements, but from talks had with you and your Mr. B. Y. Bandy, the outlook for more material seems remote.

"Under the circumstances we feel that since you are able to provide us with only a portion of our requirements, we are reluctantly compelled to resort to purchases elsewhere.

"Considering that we have a promotional convert's agreement with you, may we request the return of the latter and the substitution of a general converter's agreement with the understanding that the DuPont label and other insignia be removed from wherever it has heretofore been placed."

The Government now moves——

Mr. Gesell. Now, your Honor, with respect to that, I would like the record to show that the duPont label appears on that very letter under the letterhead of Regent Tube & Bag Company. Obviously if it was to use cellophane made by Sylvania, it would have to change its letterhead because it held out to all the world that it was a converter of DuPont Cellophane.

Mr. Renninger. Certainly it is going to change its letterhead. He says they are going to, but this is just now when he is starting to cancel the letter. He has not cancelled the letter. Are you
just trying to make something that isn't there? He defi-
3629 nitely says here that he is going to remove the standard
cellophane label from whereever it has appeared heretofore.

* * * * *

3634 Mr. Gesell. Thank you.

Mr. Renninger. Which is the answer of DuPont to Regent Tube & Bag Company saying that they will agree to cancel their promotional converter agreement and sign them up on a regular converter agreement.

(The letter from DuPoint to Regent Tube & Bag Company was received in evidence and marked, "Government Exhibit No. 5380.").

Mr. Renninger. Government Exhibit 5040 already in evidence, which is entitled "Quarterly Report, Second Quarter 1940," there is found this statement at the bottom of the second page of page 4525 of the bound volume:

"Strong support continues to be given the Promotional Converters in all possible directions both in the field and in providing promotional assistance. The 'Cellophane' Division's film 'Food
For Thought' has been shown in all headquarters
3635 groups (except New England) in series of meetings. Over
200 salesmen and executives of our Promotional Converters
have seen the film and acquainted with its cooperative use in building converter business."

As we have seen in Government Exhibit 5047 already in evidence, at page 4568: "When a converter is exclusive, we can and do work with him closely in the field."

them for their selling effort in selling converted 'Cellophane' film to about the same class of trade to whom we might offer plain or unconverted film.

"We sell to consumers whose purchases are greater in many cases in total dollars to us than the purchases of a great many, if not all, of our individual converters.

6596 "We were obliged to change from a quantity discount basis to converts to a definite uniform discount to converters by reason of the law of the land, because competition is involved between them and we have no recourse in this direction because we are not disposed to nor neither are we permitted to favor one converter against another where they compete.

"In some cases converters desire to do a little advertising or promotional effort on their own account in addition to the major advertising campaigns presenting 'Cellophane' film to the public, which is carried on by ourselves. This major advertising feature is all directed to make an acceptance of our material on the part of the public that makes it easier for your organization to sell our goods in your converted forms to the public.

"Where some of these further advertising and promotional activities are involved we have, within a small range, been willing to match dollar for dollar with a restricted amount of total sales to our promotional converters, to enable them to carry on these functions in their interest.

"We have not been willing to pay their sales expense nor their salaries and expense devoted to field sales work with anyone because we make this contribution in our discount to the converter trade. This allowance in amount is greater than our total selling expense on our direct sales."

6597 The Government now introduces into evidence Government Exhibit 5545, page 6364.

(Document entitled "Converter Advertising Allowance Report," dated October 29, 1941, was received in evidence and marked "Government's Exhibit No. 5545.")

Mr. RENNINGER. This is a listing of all converters who as of that date had applied for an advertising allowance for the year 1941. According to Government Exhibit 5041, already in evidence, all but one of the fourteen companies here listed were promotional converters. Let us look at some of these companies purchases.

The COURT. How many companies?

Mr. RENNINGER. There were fourteen companies, your Honor. All but one, the last company listed there, was a promotional converter.

According to this exhibit you will note that Dobeckmun Company's purchases amounted to over $1,000,000; Milprint's purchases of cellophane amounted to almost one million and a half dollars; and Shellmar, the biggest converter, its purchases amounted to almost two million dollars.

The next column in this exhibit gives the maximum possible allowance that duPont would have to pay these various converters under the advertising allowance, and the next column gives the share of approved estimated expenditures, that is, the expenditures that duPont has approved. Did you want to see this exhibit, your Honor?

6598 The COURT. No.

Mr. RENNINGER. The Government now introduces into evidence—

Mr. GESELL. Well, now, wait a minute. The last column shows the estimate of what the allowances are going to be against the total amount allowable in the contract. I think the record should show the exhibit is more complete than indicated. There is no indication of paying the maximum allowances, your Honor, at all, as that shows.

Mr. RENNINGER. I did not contend they were paying the maximum allowance.

Mr. GESELL. You just omitted talking about it.

Mr. RENNINGER. The Government introduces into evidence Government Exhibit 5096. This is a letter from C. F. Brown to The Dobeckmun Company, dated September 29, 1941.

(Letter from C. F. Brown to The Dobeckmun Company dated September 29, 1941, was received in evidence and marked "Government's Exhibit No. 5096.")

Mr. RENNINGER. The converter agreement containing the advertising allowance, as we have seen in 5106, was cancelled and a new agreement instituted on November 1, 1941. This exhibit, 5096, describes this change. The letter reads:

"This refers to the Converter agreement between us, dated April 30, 1941, in which provision is made for cancellation by either party on 30 days' notice.

6599 "This letter is notice of our desire to cancel the agreement in question on November 1, 1941 and to replace it with a new agreement eliminating any reference to an advertising allowance.

"The new agreement will be drawn to provide for a Converter discount of 10% on invoices for 'Cellophane' cellulose film billed at the prices prevailing from time to time in our published price lists, such invoices to carry terms of payment of 30 days net; no discount for prior payment."

The Government introduces into evidence Government Exhibit 5069 at page 4609.

(Memorandum from C. F. Brown to E. C. Lake dated February 20, 1945, was received in evidence as Government's Exhibit No. 5069.")

Mr. RENNINGER. This is a memorandum from Mr. C. F. Brown to E. C. Lake dated February 20, 1945, subject "Discount Inducement for Promotional Converters."

It reads:

"I sent you not long ago result of our talk with Mr. Provost of the Legal Department which indicated very little possibility of arriving at any method of price reward to our 100% promotional converters, with the exception of the advertising allowance method.

"Therefore, I am inclined to think we should investigate the advertising allowance method more thoroughly. True, 6600 our experience with it several years ago was not particularly successful. A few of our converters used up the allowance, based on the very stringent regulations which we set up surrounding it. In most cases, the converters that we wanted to favor profited by it least percentage-wise.

"On the other hand, it may be possible through careful study to set up a different plan which would do a better job and right at the present time I can see no other possibility.

"You remember when Billy Heller—" I might say parenthetically that Billy Heller is from Milprint—"was here he mentioned this as something that he would like to see put in. He also mentioned art work as a factor to be included. I don't know how this can be done, but it is not beyond the realm of possibility. Why not list all the types of work that the constructive, creative converter does that the small fellow doesn't, or where he has the advantage, or what we want to encourage, and see what we get."

As we have seen in Government Exhibit 5541, duPont divided its converters into two groups, the promotional converters and the regular converters. Both are converters of cellophane, but the promotional converter must buy his entire requirements from one source, duPont. Let us look at a typical regular converter contract and compare it with a typical promotional converter contract.

6601 The Government offers into evidence Government Exhibit 5420, pages 5281 to 5284, inclusive.

(Converter agreement between E. I. duPont de Nemours & Company and The Cuneo Press, Incorporated, dated March 30, 1943, was received in evidence and marked "Government's Exhibit No. 5420.")

Mr. RENNINGER. This is a typical regular converter agreement between duPont and the Cuneo Press dated March 30, 1943. This exhibit shows the elimination of the advertising allowance that was in effect prior to November 1, 1941, and the increase of the converter discount to 10 percent.

The Government introduces into evidence Government Exhibit 5378, which is a typical promotional converter contract. This is a promotional converter agreement between duPont and the Regent Tube & Bag Company, dated May 13, 1942.

(Promotional converter agreement between E. I. duPont de Nemours & Company and Regent Tube & Bag Company dated May 13, 1942, was received in evidence and marked "Government's Exhibit No. 5378.")

The COURT. Before you start referring to those I think we will take our luncheon recess at this time. The Court recesses until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m., of this same day.)

6602 2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. RENNINGER. If your Honor please, just prior to the morning recess I had introduced into evidence Government Exhibits 5420 and 5378, which are typical regular and promotional converter agreements. The promotional converter agreement, Government Exhibit 5378, had the following provisions contained therein that we do not see in the regular converter agreement. This is found on page 5188:

"1. Manufacturer hereby appoints Converter as one of its Promotional Converters, and undertakes to extend to Converter all reasonable technical and merchandising assistance in promoting the use of cellophane.

"2. Manufacturer grants to Converter the privilege of using its red and blue Standard Label in connection with the advertising and sale of said product.

"3. Converter recognizes that the goodwill attached to the trade name of Manufacturer and its product is dependent in a measure upon the essential functions of Converter; and Converter agrees that to the best of its ability it will conduct its operations and activities in such manner as will sustain and promote the goodwill of Manufacturer.

6603 "4. Converter shall purchase from Manufacturer, and Manufacturer shall sell to Converter, the latter's entire requirements of cellophane for conversion purposes only. Converter shall pay therefor Manufacturer's list price current at time of delivery, less the Converter discount of ten per cent (10%)."

These converter contracts are typical contracts and remained in effect until 1947.

Government Exhibit 5046, already in evidence, shows the chronological development of Du Pont converters beginning in 1925 with the American Paper Goods Company and shows the particular converters who entered the system for each successive year thereafter down through 1940. In that exhibit Du Pont's promotional converters are designated by an asterisk. One hundred per cent Du Pont converters are in caps without the asterisks. And the rest are either two-source or Sylvania converters. At that time it showed that Du Pont had fourteen promotional converters, ten other 100 per cent Du Pont converters, and eleven two-source of supply converters.

The COURT. As a result of these contracts, Mr. Renninger, under your view what was the relationship between the parties, that is, a promotional converter vis-a-vis Du Pont? Was it simply a debtor-creditor relationship or was it something beyond that?

Mr. RENNINGER. I think it is the ordinary debtor-creditor relationship, your Honor.

6604 The COURT. You are more familiar with the contract. I have never seen it. I was just asking for information, that is all.

Mr. RENNINGER. The Government moves into evidence Government Exhibit 5041, which is a list of converters, fabricators and agents for 1942.

(List of converters, fabricators and agents for 1942 was received in evidence and marked "Government's Exhibit No. 5041.")

Mr. RENNINGER. The Government moves into evidence Government Exhibit 5042, which is another list of converters, fabricators and promotional converters and agents for a different period during the year 1942.

(Second list of converters, fabricators, promotional converters and agents for year 1942 was received in evidence and marked "Government's Exhibit No. 5042.")

Mr. RENNINGER. This exhibit lists 14 promotional converters and 25 other converters.

Government Exhibit 5531, which is already in evidence, is another list of converters as of December 31, 1944.

The Government moves into evidence Government Exhibit 5044, which is a list of promotional converters, converters and fabricators as of April 5, 1946, which shows that at that time there were 40 promotional converters and 32 regular converters.

6605 (List of promotional converters, converters and fabricators as of April 5, 1946, was received in evidence and marked "Government's Exhibit No. 5044.")

Mr. RENNINGER. It is the Government's contention that by these exclusive converter agreements duPont attempted to keep all purchases by the leading converters to Du Pont and thus perpetuate its monopoly control. As we have seen from the agreements themselves, the inducements used to persuade a converter to sign the promotional converter agreement was the use of its standard label, admittedly an item of value, and the granting by duPont to its promotional converters of certain technical and merchandising assistance, which will be discussed more fully later.

Mr. Gesell. May I interpose on that to clarify the issue. Does the Government contend that the regular converters did not get technical service and did not have the right to use the label?

Mr. Renninger. It is my contention that they did not have the right to use the label.

Mr. Gesell. Is it also your contention that they did not receive technical service from duPont?

Mr. Renninger. If your Honor please, my answer to that should be predicated this way. There is no question that in various circumstances if a regular converter bought cellophane
from duPont and had difficulty in printing that cello-
6606 phane or he had difficulty in making it fit into his machine,
there is no doubt that duPont, to insure that he would keep on using the duPont cellophane, would come along and certainly assist him. There is no question about that. But what our contention is and what the contract itself specifically provides for is that these promotional converters were specially favored in the granting of certain extra services.

Mr. Gesell. Well now, so the issue can be clear on the record, your Honor, it is our position that the regular converters under the regulations of the company could use the label and did and that they received service comparable to the promotional converter service.

The Court. Well, you remember this morning I made inquiry and I was trying to grasp the distinction—I thought it was difficult enough at that time—between a converter and a fabricator. Now we are cut down into the sub-strata of regular converters and promotional converters. Not having had the question answered to my satisfaction this morning, you can realize the further difficulty I am in up to this moment this afternoon.

If the services were performed for each of the same quality and quantity and for the same purposes, then why do we have all these names?

Mr. Gesell. Promotional were exclusive converters, your
Honor; the regular were non-exclusive. In other words,
6607 the promotional converters agreed to buy their entire
quantity from duPont.

The Court. So it mattered not whether you bought your entire product from duPont, you got the service?

Mr. Gesell. You got the service. You had greater opportunity to use the label because there was not the question of confusion as there was in the case where a man was buying from two sources.

Mr. Minicus. I would like to make it clear that that is Mr. Gesell's contention and not ours at all. We say that the services varied vastly between the various classifications and that they were a different type and a different nature, and I understand Mr. Renninger intends to bring that out in his proof.

Mr. Gesell. There is not any proof on that yet at all and there won't be any to come. I am trying to keep this to proof and not theory.

Mr. Minicus. It is difficult to get in any proof at all if Mr. Gesell keeps getting up in the middle of our sentences, or we keep interrupting the beginning of his, we cannot get to it at all. We hope to put in the proof in time if he will let us.

The Court. Well, after you two gentlemen have settled the matter to your satisfaction, I wish you would try to direct your
answers to my inquiries once in awhile. Here you get in
6608 combat again. The question I put was, if the services
were similar as to both, do you agree with Mr. Gesell's statement that the only difference was that one took his entire output from duPont and the other was not so limited?

Mr. Renninger. No. If your Honor please, perhaps if we go ahead we might be able to point out instances——

The Court. All right, I will have faith.

Mr. Renninger. If your Honor please, in the first place I think I should point out to you that the difficulty that you are having is the difficulty that we also are having. It is an arbitrary and vague distinction that the defendants have themselves set up as to what is to one and what is to another; they overlap so that it is almost impossible for anyone to come down with a clear-cut definition. We would like very much to give you a true and correct definition, one that could be stated in a few words, but it is impossible, and it is not our fault.

The Court. All right, proceed.

6609 Mr. Renninger: It is the Government's contention also, your Honor, that duPont was able to establish and maintain its control over these converters, and one of the reasons that they signed every promotional converter agreement also is by a deliberated policy of selectivity in its choice of converters. This has been described in Government Exhibit 5047 which has been admitted in evidence previously, and I might say, your Honor, that this is one of the documents that we consider as one of the most important documents in this phase of our case.

Mr. Brown on April 28, 1941, the date of that exhibit, set forth duPont's selective policy and how this policy fits into the picture of exclusive representation. In talking about these advantages Mr. Brown states at page 4568:

"Selective distribution and exclusive representation go hand in hand. It is difficult, if not impossible, to maintain exclusive representation without selectivity. You cannot have your cake and eat it, too.

"Exclusive representation is valuable to us beyond the tonnage involved."

Again at page 4569 Mr. Brown states:

"Loss of the exclusive feature with our promotional converters would be even beyond the volume of business lost. We could not work in close collaboration. We could arm him to develop business which we might not enjoy, much time of our men would be wasted in doing competitive insurance work, their productivity greatly reduced due to the adding of much greater competitive complications. (Specification of film on every order by the user would be our only safeguard.) To protect our position, our sales force would have to be increased." 6640

Then this next statement:

"We would be placed in a position of competitive selling with our best customers, instead of closely collaborating with them in a situation of mutual confidence."

I suppose it is just good business when you can so control your customers that you don't have to worry about competition.

Mr. Gesell. Now, if your Honor please, may I ask for a clarification of this issue? Does the Government contend it is illegal to have a selective distribution system?

Mr. Renninger. Of course. A selective——

Mr. Gesell. If it does——

Mr. Renninger. No.

Mr. Gesell. What is it? Do you or don't you?

Mr. Renninger. I thought you were talking about exclusive distribution.

Mr. Gesell. Is there anything illegal in the selective converter policy that they have now read to the Court four times? That I think we ought to know, and if so the grounds of the illegality so that we know what we are trying to meet.

Mr. Minicus. I think, your Honor——

6641 The Court. Wait a minute. Remember what you said ten minutes ago.

I think it ought to be understood when you ask me these questions I am only the sounding board. It is supposed to bounce back to you Mr. Renninger.

Mr. Renninger. I beg your pardon for answering Mr. Gesell.

The Court. Come on, Mr. Minicus. You might as well get business and operation—and of sufficient flexibility to meet the needs of a growing industry.

"This, we feel, was a logical decision as our was (and still is) a relatively high-priced specialty, promoted in an undeveloped market (still very far from saturation) a trademarked, patented product, promoted through extensive advertising and crea-
6709 tive selling. Selective distribution would not be advisable or successful in connection with products not having these or similar advantages."

Now, note this, your Honor, with particular attention, please. The report says: "We could not, and still cannot sell against our main competitor, paper, on a purely commodity basis at two to four times the price. Specialty selling and selective distribution have been the leading factors in combating commodity selling and the wide open distribution of paper."

Let me go on. "Selective or controlled distribution is a long established principle in connection with products in our category in a wide range of industries and, of course, applies generally to jobber distribution and retailer distribution as well as converter distribution.

"As our business grew, as our markets expanded, as new markets opened up, we have likewise expanded our converter distribution, attempting to adapt and widen our selective policy; not only to fit current needs but with an eye to future trends."

Now, is that the talk of a monopolist, or is that the talk of someone seeking to compete effectively in recognized standard business ways in accordance with accepted business practice? I think it is clearly the latter.

This was formulated and carried out by duPont at arm's length as an independent business policy, and really, your Honor,
6[illegible]0 again it occurs to me that if this had been a monopolistic situation we would have found duPont integrating from top to bottom, instead of entering these existing markets and competing on the level with the other materials. We would have converted, we would have fabricated, we would have covered this thing from one end to the other, but we were entering into a competitive existing market and we adopted this as our best selling technique.

This was, if your Honor please—and I must emphasize this again and again—a question of developing new uses, new outlets, in a creative way.

Look at what the report says a little later at page 4564. It says: "It must be remembered that current volume of converted business depends not on the number of converters, the capacity of their plants, and even the amount of order solicitation, but rather it off your chest. What is it you want to say? Have you forgotten?

Mr. MINICUS. Not at all, your Honor. I simply don't think it is a proper question for Mr. Gesell to address to the Government, to ask us what is illegal and what is not illegal. We are not here to usurp the position of the Court.

Mr. GESELL. Oh, I just want to have the issues framed.

The COURT. He has asked what is the Government's theory or what is the Government's charge or where is the illegality of the promotional converter policy followed by the defendant? That seems to be a simple question.

Mr. MINICUS. We have not alleged it is illegal, your Honor. We have alleged merely that it is one of the things in this case which has led to the monopoly which we have charged as illegal.

Mr. GESELL. Do I understand from that, your Honor, there is no charge of illegality?

6612 The COURT. I suppose I can gather from this statement, then, that if the means utilized are legal in nature but the result is the illegal monopoly, that is what you are after?

Mr. MINICUS. That is very often the case. Here we think that this selective policy is so tied with the exclusive policy that the courts have held that exclusive contracts of this nature are illegal: that if any of the illegality of the exclusive contract leans over into the sphere of the selectivity, why, I suppose the selective agreements will be colored by that illegality, too. We don't think that a determination of that point is essential to the case, because it is quite clear that the selective policy has led to the exclusive agreement, and the exclusive agreement is so closely tied to the monopoly that they are all parts of the same thing. But whether they are legal or illegal makes no difference and I don't think we have to decide that point.

Mr. GESELL. If your Honor please, I am still trying to get the issue framed. I take it that the charge, then, is that to have an exclusive distributor is illegal.

Mr. MINICUS. It doesn't make any difference. We have said that as a result of these exclusive agreements they have been able to maintain their monopoly. The monopoly is illegal. We have not charged in this case any violations of the Robinson-Patman Act. We have charged a violation of the law under Section 6613 2 of the Clayton Act and that is the only thing with which the Government is concerned with the illegality of. If these things happen to be illegal they may be aggravated, but they are not crucial to our case by any means.

The COURT. That was the question I was just about to ask. How critical is the evidence concerning this policy with respect to the various types of converters that the defendant had?

on the number of consumers and potential consumers of "Cellophane", the activity in soliciting them and the sound creative merchandising done on them—the ability to develop new business. This type of work can be done by our field organization and a certain type of converter organized to do it—not by the ordinary printer. Experience has shown that best results are obtained by a specialized sales organization and such a sales force can be set up and operated properly only by an able organization—selectivity is necessary."

There are other comments, your Honor, which I will
6711 not take the time to read in that report, all to the same
effect.

So we have, it seems to me, on that phase of the case a clear legitimate non-monopolistic business intent, the intent to compete effectively, and we have no proof of any monopolization of the marketing outlets, and as so frequently in this case we end up merely with a theory.

Turning to the second question, the Robinson-Patman Act issues, they seem even more theoretical to me, your Honor, because here we are confronted with the extraordinary position that Mr. Renninger and Mr. Minicus take different views as to the nature of the violation, and rather than attempting to straighten that out, I think I will deal with it on both theories, because in that way we will have the matter covered once and for all.

The first theory is the theory advanced by Mr. Minicus that it
does not make any difference what happens at the second level
of competition, that they are not interested in that, that that is
beyond the scope of their allegations—that is to say, competition
between converters, fabricators, jobbers, agents and so forth. The
theory is stated this way, that the action of a particular seller
in giving a quantity discount mitigates against the ability of his
rival seller to compete with him. In other words, as I under-
stand the theory advanced by Mr. Minicus, it is that the
6712 various differences of price to different categories of
purchasers resulted in a discrimination against Sylvania
in a way which injured Sylvania's competition.

That, your Honor, if the Act means that—and I think there is considerable doubt whether it does or does not, but let's assume it does—that certainly cannot be supported by theory. It must be supported by proof; and it seems to me that there must be two things shown before the charge can be made that there was a price here which channeled business to duPont.

The first is, they must show that duPont's price was in some way discriminatory, because duPont certainly has the right to fix prices, and if those prices are lawful and proper, Sylvania has no complaint if its prices are higher or lower or different.

Mr. MINICUS. The issue itself we believe is quite critical, your Honor, but its nature and categorization or classification of its nature is not critical. In other words, the Court has pointed out that these could very well be legal means to an illegal end or they could be illegal means to an illegal end, but their nature is not necessary as long as the end itself is illegal. I think Mr. Renninger intends to elaborate on this point and point out that exclusive contracts of the nature which we are dealing with here have been condemned by the Court. It is not a question of the selective policy. The policy is not to be judged. It is the outcome here in the contract, which is an exclusive agreement.

The COURT. Have you had your issue drawn to your satisfaction, Mr. Gesell?

Mr. GESELL. No, your Honor.

The COURT. Let us proceed.

Mr. RENNINGER. As Mr. Minicus stated, it is also the Government's contention that these promotional converted con-
6614 tracts, the exclusive contracts, are illegal under both the Sherman and the Clayton Acts, and the presence or absence of non-exclusive dealing regular converter contracts is immaterial. An agreement between a dominant supplier and dealers which forecloses a substantial segment of the market from competing suppliers and which deny dealers access to said suppliers are per se unreasonable restraints of trade under the Sherman Act. The agreements which have the potential of accomplishing the above, even if they actually do not do so, are also violative of Section 3 of the Clayton Act. If you wish I can go into Section 3 of the Clayton Act.

The COURT. It is not in issue, is it?

Mr. RENNINGER. Insofar as we contend that of course these agreements are——

The COURT. I thought we were interested in Section 2 of the Act.

Mr. RENNINGER. We are, of course, interested in that.

The COURT. Well, some day when I have a lot of leisure time I might be interested in that field. It is far off, so don't wander into it unless you have to.

Mr. RENNINGER. As I say, it is the Government's contention that these also violate Section 3 of the Clayton Act.

Mr. GESELL. You see why I said it was not clarified to me, your Honor?

The COURT. It is not an offense charged in the com-
6615 plaint, is it?

Mr. RENNINGER. No, not as such. The complaint also makes—I would like to explain, your Honor, the complaint in Section 36 or 37, the section dealing with the distribution section sets forth various restrictive—what the Government contends is restrictive practices, practices which are in restraint of trade, and the statement is made therein that some of these practices are illegal and others are not illegal. This I just wish to point out is one that we consider as being an illegal practice.

* * * * *

6619 Mr. RENNINGER. The Government introduces into evidence Government Exhibit 5432, which is a letter from the Gummed Products Company to E. I. duPont de Nemours & Company dated October 27, 1942.

(Letter from the Gummed Products Company to E. I. duPont de Nemours & Company dated October 27, 1942, was received in evidence and marked "Government's Exhibit No. 5432.")

Mr. RENNINGER. duPont salesmen, of course, would stress the advantages of the promotional converter agreement to any prospective converter, as we see in this exhibit. The second paragraph reads:

"In line with our conversation at that time, we are enclosing your converter agreement duly signed. It is our hope that before long our experiments and contacts in this new field into which we are entering will prompt us to want to execute your promotional converter agreement. We can well appreciate the benefits to be derived from same, but for the present we feel we should not obligate ourselves directly until we find our place in this new field and know more about who our customers will be."

duPont, once a converter had——

Mr. GESELL. If your Honor please, I think I should note on the record that the following paragraph shows that before this man has signed any kind of converter agreement we are giving him technical assistance.

6620 Mr. MINICUS. I wish Mr. Gesell would point that out to us in this letter, your Honor. There isn't a word about technical assistance in that letter, not one single word about technical assistance in there.

Mr. GESELL. (Reading) "In the meantime, we want to thank you for the assistance you have given us, and will look forward to the additional help you promised to give us while on your current middle-western trip." This is——

Mr. MINICUS. I say that is not technical assistance.

Mr. GESELL. It is a letter to Mr. Bandy, who is shown by these documents to have been a sales representative who called on this trade.

Mr. RENNINGER. Who I presume would be able to give technical assistance.

Mr. GESELL. Yes, completely qualified in all respects, about 25 years service on the job.

Mr. MINICUS. Mr. Gesell has addressed several questions to the Government this afternoon. I would like to address one question through the Court if I may. Is that the only assistance Mr. Bandy was qualified to give? This is a customer of the duPont Company. I suppose there could be assistance in quite a few ways other than technical assistance.

Mr. RENNINGER. There is only one thing I would like to say, your Honor. Mr. Gesell has a perfect right of answering me and answer what I bring forward in these documents——

6621 The COURT. Remember this morning he stated that he wished the opportunity to arise as you treat several documents only to issue a caveat for the purposes of the record, to me I suppose, when I come to consider those documents. I stated that I saw nothing objectionable in that unless it became so annoying to you that you asked for help and then I would give it to you. So let us proceed from now and when you feel the pinch, you tell me.

Mr. RENNINGER. Thank you, sir.

It is the Government's contention that duPont, once a converter had signed the promotional converter agreement, was anxious to keep him on as a promotional converter. Of course during the wartime shortages that was an exception. But the following document shows the great lengths that duPont would go in attempting to keep a promotional converter.

The Government introduces into evidence Government Exhibit 5052 at page 4586.

(Letter from American Can Company to Mr. C. F. Brown dated September 3, 1943, was received in evidence and marked "Government's Exhibit No. 5052.")

Mr. RENNINGER. This is a letter from the American Can Company to Mr. C. F. Brown of duPont, dated September 3, 1943. Mr. Edward H. Klein, the author of the letter, states:

"Due to present conditions, it may be advisable for us to be in a position to secure a portion of our Cello-
6622 phane requirements elsewhere and we would appreciate your sanction of doing so under the Promotional Cellophane Converter's agreement."

There is a penciled notation at the bottom of the letter, dated 9/9/43, stating, "Figgis on vacation. Pfeltz out for the day. Interviewed Klein and was advised:

"(1) Purchase from Sylvania months ago was in conflict with agreement and they wanted to clarify now in view of possible repetition;

"(2) No intention of buying from Sylvania;

"(3) Suggest we see Pfeltz sometime soon;

"(4) Future purchases will be made by General—" and then there is something illegible.

There is another notation dated December 10, 1943, which says: "Phoned Pfeltz who advised that he wanted free hand to try competitive film if desirable or necessary but not of sufficient importance requiring attention now—agreed to see at some near future time."

Then there is also another penciled notation, which is dated April 18, 1946—this reads: "Talked with Bishop by 'phone. Mr. Pfeltz absence, who offered to investigate and advise us."

It is the Government's contention that in addition to violation of the Clayton Act and the Sherman Act by its all-require-
6623 ments contracts, duPont granted certain discriminatory services to promotional converters that it did not grant to regular converters. As we have seen from the written contracts themselves a promotional converter was granted several services that were not provided for in a regular converter contract.

First, in Government Exhibit 5378, a typical promotional converter contract, a promotional converter was granted, one, all reasonable and technical and merchandising assistance; and two, was granted the use of the duPont standard label. Both of these provisions are not contained in the regular converter contract, copy of which is found in Government Exhibit 5420, which is already in evidence. It is the Government's contention that these extra services granted to promotional converters are also illegal under the Robinson-Patman Act, Section 2 (e).

Let us look at duPont's provision for the grant of the use of its standard cellophane label.

The Government moves into evidence Government Exhibit 5373.

(Document headed "E. I. duPont de Nemours & Company—Use of Standard Cellophane Label" was received in evidence and marked "Government's Exhibit No. 5373.")

Mr. RENNINGER. This document describes the various conditions under which duPont's cellophane label may be used. Let us look at some of the provisions. Under paragraph 3,
6624 "Identification of Product" it states: "The Standard Label shall not be used in any way which permits misrepresentation or deception as to the use of our product, or which promotes the sale of competitive film or articles embodying such competitive material.

(a) It will be used only on du Pont Cellophane.

(b) It will not be used in advertising or selling any articles or products if competitive film is used by the customer wholly or partly in such articles or products, or in any lots of similar articles or products.

(c) The user shall permit du Pont to determine, through inspection at reasonable intervals, on what products and with what types of film the label is being used. The user shall also demonstrate to du Pont what labels are being used on or with other brands of film, and the extent of such use, if the user is converting or distributing other brands.

"4. Specific Approval. Each new form of label, and each new use of the label, shall be submitted in finished sketch-form for approval by du Pont before printing and proofs are ordered."

The Court. Tell me what is a label?

Mr. Renninger. The duPont cellophane label, your Honor, is on this document here. It is usually in red, white and blue—isn't that right, Mr. Gesell?

6625 Mr. Gesell. It is always.

Mr. Renninger. Always in red, white, and blue colors.

The Court. What is your criticism of duPont's interest in not having this label put on another's product?

Mr. Renninger. We have no objection to that, your Honor. It is the fact that only a promotional converter can use the Du Pont cellophane label.

Mr. Gesell. Oh, no. The contract says to the contrary, Exhibit 5420, paragraph 3, page 5281; you have introduced that as the regular converter contract and it says precisely the contrary.

The Court. Well, frankly, I have not caught the significance of the activities of duPont and converters with respect to the label.

Mr. Renninger. If your Honor please, the documents will show that it is admittedly an item of value and the converters under our contention, only the promotional converters could use this label on their products, or on their stationery, and this is an item which is not granted to the regular converter. The regular converter agreement that Mr. Gesell is talking about, in paragraph 3, says, "The converted products made from the material so purchased may be labeled and marked as 'DuPont Cellophane', in accordance with specific instructions furnished by manufacturer."

6626 Mr. Gesell. And these are the instructions, 5373, that we are looking at now.

Mr. Renninger. May I continue, your Honor?

The Court. Yes.

Mr. Renninger. Government Exhibit 5047, which is already in evidence, dated April 28, 1941, at page 4569, makes this statement: "Use of the standard 'Cellophane' label is today confined to exclusive promotional converters and it is an asset of real value. It would hardly be possible to control its use and maintain its value under non-exclusive conditions."

Again at page 4569 of the same exhibit the same thought is expressed:

"Loss of the exclusive feature with our promotional converters would be even beyond the volume of business lost. We could not work in close collaboration."

DuPont at various times had various booklets and other advertising material printed for the use of its promotional converters only. The following are examples:

The Government moves into evidence Government Exhibit 5058, 5059, and 5060. These are notices of various advertisements appearing in various magazines and in most instances providing copies for the use of the promotional converter.

(The letter from E. C. Lake dated July 28, 1943, was received in evidence and marked, "Government Exhibit No. 5058.")

(The letter from E. C. Lake dated September 21, 1943, was received in evidence and marked, "Government Exhibit No. 5059.")

(The letter from E. C. Lake dated September 23, 1943,
6636 was received in evidence and marked, "Government Exhibit No. 5060.")

Mr. Renninger. At the beginning of each one of these letters is a statement that copies of this letter were sent to all promotional converters or all converters on the cooperative list.

Some other examples of technical assistance granted to promotional converters is found in Government Exhibit 5534, a letter from Traver Corporation to DuPont dated June 2, 1942, in which the Traver Corporation says "Thanks for your kind and much appreciated suggestion that we send one of our superintendents to your Clinton plant so that he may study your method of slitting and rewinding cellophane."

The Traver Corporation at that time was a promotional converter. I offer that in evidence.

(The letter from Traver Corporation to E. C. Lake dated June 2, 1942, was received in evidence and marked, "Government Exhibit No. 5534.")

Mr. Renninger. The Government moves into evidence Government Exhibit 5057, which is a letter from Cellophane Research to Mr. E. C. Lake dated July 15, 1942.

(The letter from Cellophane Research to Mr. E. C. Lake dated July 15, 1942, was received in evidence and marked, "Government Exhibit No. 5057.")

Mr. Renninger. There they discuss the fact that the
6637 DuPont Research Department members of the Cellophane
Research Department went to the plant at the Nashua Gummer-Coated Paper Company to investigate their difficulties in laminating various types of cellophane.

Mr. GESELL. Oh, now, I think we should have the record show hat that is with respect to lamination of wartime gas cape flameproofing. It is dated 1942 and marked confidential and pertains to military work.

Mr. RENNINGER. The Government moves into evidence Government Exhibit 5061, 5062, 5063, and 5064. All these documents show how DuPont assisted Milprint in obtaining a chemist and other technical men for Milprint's converter operations.

(The letter from William Heller to E. C. Lake dated August 28, 1943, was received in evidence and marked, "Government Exhibit No. 5061.")

(The letter from William Heller to E. C. Lake dated August 28, 1943, was received in evidence and marked, "Government Exhibit No. 5062.")

(The letter from E. C. Lake to Mr. William Heller dated September 8, 1943, was received in evidence and marked, "Government Exhibit No. 5063.")

(The hand-written note addressed to Dear Billy dated April 18, 1944, was received in evidence and marked, "Government Exhibit No. 5064.")

Mr. RENNINGER. The Government moves into evidence—

6638 Mr. GESELL. Just a minute. On one letter which Mr. Lake wrote to Mr. Billy Heller, 5064, the two men had been associated, this record shows, for over twenty years, and somebody has written on the bottom "Note the personal angle," because the letter is signed Ed and addressed "Dear Billy." Now that is not part of the exhibit and apparently reflects the attitude of the Government investigator who thought he had found something of consequence. I don't think it ought to be offered with that on it, your Honor.

Mr. MINICUS. I know nothing about that notation at the bottom there, your Honor. I didn't put it on and I don't know whether anybody in the Government did, but it is not important in the case and we won't insist upon it, certainly.

The COURT. All right, black it out.

Mr. RENNINGER. The Government moves into evidence Government Exhibit No. 5535, which is a letter from Cellophane Research to Shellmar Products Company, Mount Vernon, Ohio, dated September 11, 1943, in which the Cellophane Research Department states that "In response to your inquiry the Buffalo Laboratory will send you several samples of material which offer possibilities of improved adhesion at high humidities. They will also send you the know how on the subject.

"There is, as I have suggested before, a lot of background which would be of benefit to your man who is working on this

which we will be glad to give to him if you would care to
6639 arrange for him to go to Buffalo.'"

(The letter from Cellophane Research, G. M. Karns, to Shellmar Products Company, dated September 11, 1943, was received in evidence and marked "Government Exhibit No. 5535.")

Mr. RENNINGER. I might say here in reference to Shellmar, your Honor, that during the war due to the fact that Shellmar manufactured quite a number of gas capes Shellmar purchased cellophane from Sylvania. However, it is the Government's contention that DuPont always considered them really as their own promotional converters. In all their lists of promotional converters they are always maintained on that list as a promotional converter. As an example, in Government Exhibit 5042 in 1942 they were listed as a promotional converter. Government Exhibit 5044 in 1946, they were also listed as a promotional converter. Government Exhibit 5531 in 1944 shows that they are also listed as a promotional converter, although it does show that Shellmar is purchasing some of its cellophane from Sylvania, but for war cape purposes.

The COURT. Let us take a ten-minute recess.

(At this point a brief recess was taken.)

* * * * * *

6647 (Instruction Bulletin No. 11-N dated April 15, 1938 was received as Government's Exhibit 5533.)

Mr. RENNINGER. Mr. Brown states: "You recognize the above as successor to Continental Paper & Bag Corporation of New York City, which was on our list of 'Miscellaneous Converters' for some years.

"As Oneida use both DuPont and our viscose competitor as sources of supply, they are not considered in the 100% class and therefore not a 'Preferred Converter.'

"On the other hand, they tell us we are getting the largest share of their business, and that our film is and will be used whenever the customer so specified.

"With this in mind, when concerns express a definite preference for Oneida, it is not desirable to sell them off, but be sure the order specifies 'CELLOPHANE' from duPont.

"Naturally, we do not want our men to disparage Oneida—it is not good selling."

In this document Oneida Paper Products Company was a two-source converter having only a regular converter contract with duPont, and Mr. Brown is telling his salesmen not to refer business away from Oneida where the salesmen can get
6648 Oneida to use duPont Cellophane.

* * * * * *

6699 Mr. Gesell. The material I am going to discuss, your Honor, falls in the group of exhibits between 5047, which was the lead off exhibit on this section that Mr. Renninger offered, down through 5467.

I think the best way it can be summarized is to group it under three major headings. A discussion of the selective distribution and promotional converter set-up would be the first heading. The next take up the Robinson-Patman Act questions ~~that have~~ been presented. And third, deal with the label question. I believe, under those three headings I can cover whatever remains of consequences on this portion of the case.

I would like at the beginning, however, to see if I could not give the Court a little clearer picture of duPont's over-all sales distribution set-up because it is against the background of that that these various contracts and arrangements have to be viewed.

The most important single fact bearing on this question, which was not referred to throughout these two days of discussion, is that duPont employs its own salesmen who call on the ultimate consumers as well as upon all of the indirect sellers. In other words, your Honor, a converter who makes a peanut bag, for example, and is selling that peanut bag to some peanut manufacturer not only is soliciting that man himself with his con-

6700 verted item but duPont has salesmen calling directly on the customers of the converter and salesmen calling directly on the customers of all the indirect sellers, as well, of course, as salesmen dealing with the so-called direct users, like the cigarette companies, which we are coming to.

Perhaps the best way to give your Honor a picture of that is to indicate the organizational set-up of the Sales Department which has existed throughout this period. There was always a Director of Sales, Mr. Benz, for most of the period, whose name you have seen, later Mr. Brown, and under the Director, two assistant Directors, one an Assistant Director of Sales dealing with the direct selling, that is, directly by duPont, delivering goods to the ultimate consumer, and another Assistant Director of Sales, indirect, Mr. Lake, whose name you will have seen through these documents.

The Court. Did they hold their positions in the Rayon Division alone or was there a general Sales Department

Mr. Gesell. They held their position in the Cellophane Division alone. They were both concerned with cellophane. One was an Assistant Director for the direct sales and one an Assistant Director for the indirect.

Now, each of them had salesmen reporting to them calling on the trade and developing business. The record shows, in Exhibit

5047, that duPont had 50 such salesmen who covered the entire country.

6701 The second factor relating to the distribution is the promotional character of cellophane sales. Here was a new specialty item trying to break its way into already established markets where other materials were being sold. It was a question, as the exhibits show, of developing interest in the consumer in the utilization of cellophane to replace higher materials. Its higher cost, its novelty and the other factors that are mentioned in the exhibits put it at a disadvantage.

So duPont's salesmen were constantly out in the market calling upon the trade, trying to stimulate a demand. And to give an example, which is one we had yesterday by way of illustration, take the question of the Post-War Locker Package Manual that was mentioned. Here is a copy of that manual (illustrating), an elaborate manual giving detailed directions on how to wrap and handle different goods under different conditions with cellophane. DuPont's salesmen would be out around the country calling upon the locker operators, the people running these food lockers, trying to convince them that cellophane was the article that they should use, and if they got a nibble, if they got a bite, and somebody said, "We would like to try cellophane in converted form. Can somebody make this up so that we have a package that we can put our frozen foods into?" the salesman would say, "Sure," and he would give to that man a list of duPont's converters in the neighborhood who were qualified to make the package and supply it to the locker operator.

6702 The COURT. May I see that manual, please?

Mr. GESELL. In connection with it, your Honor, you may want to note the label which is on the inside back cover concerning which we will have some discussion later.

Now, this was educational, developmental selling, promoting a new specialty into an existing market, and that fact is the paramount fact that must be understood in connection with an appraisal of these various arrangements.

I would like now to turn and discuss the first of these three categories that I mentioned, the selective policy which the Government says when coupled with an exclusive arrangement for promotional converters was illegal and monopolistic.

First, as to the exclusivity, your Honor, I think it is important to note that all of the exclusive arrangements with promotional converters could be terminated on thirty days' notice by the distributor. This idea that the distributors were hog-tied in some way to du Pont is not borne out by the contract. The contract could be cancelled on thirty days' notice.

Exhibit 5204, paragraph 8, at page 4903 shows the situation up to 1941 where the termination clause said that termination could be made in thirty days after one year. Subsequent to 1941 Exhibit 5378, paragraph 6, at page 5108 contains a plain
6703 thirty days' notice; and if we need any more proof of it, the Government offered evidence in the so-called Regent Paper Bag situation which shows in Exhibit 5379 that Regent asked to shift from an exclusive to a non-exclusive converter on February 19, 1946, and by return mail in Exhibit 5380 we said "Go ahead, here is a new contract."

Now, I emphasize this aspect because this exclusivity idea is a myth contractually.

Second, let us assume they were exclusive distributors. We were told twice yesterday that the Government was coming—we are getting near the last day and we are still coming to something—coming to cases and decisions which were going to show to your Honor that it was illegal to have exclusive distributors, and the charge was repeatedly made that it was illegal to have them. Your Honor, there is not a case that we know of or can find that supports that view that exclusive distributors are illegal per se. Your Honor's own decision in the Camfield case appears clear on that issue, and there are hosts of other authorities going all the way from the Appalachian Coal case on the one hand up to the Columbia Steel case on the other and U. S. versus Lindy Air Products in 83 Fed. Supp. The Virtue Creamery case and the Bausch & Lomb case make that clear, and the Federal Trade Commission even has rulings to that effect which are published in the C. C. H. service. So that is another one of these canards that did not turn out. There isn't anything wrong in
6704 having as such an exclusive distributor arrangement.

So the charge come down to what the Government says, and as I see it, was monopolizing the marketing outlets, and I really think that is what this part of their case is about, if it is about anything—the monopolization of marketing outlets. As to that, your Honor, I think there are facts in this record which conclusively demonstrate no monopolization of marketing outlets. And so we contest these agreements and arrangements not against some abstract theory, but against realities that are shown by the exhibits.

I would like to run down the facts that the exhibits show briefly and demonstrate the absence of any monopolization of marketing outlets. What is the first fact? Exhibit 414 shows that Sylvania had a greater proportion of the indirect business than du Pont did measured by the rate of their direct and indirect business of the two companies. Du Pont ran 33 to 35% indirect, Sylvania runs 40%.

Second, what is the fact? Sylvania had 45 converters in 1935, 53 in 1940, 63 in 1945. That certainly does not suggest that they were precluded from marketing outlets.

Exhibit 5047 at page 4569, which the Government says is one of its key exhibits in this case, contains this statement that they offer as of 1941 this is, your Honor, and the statement is, "Competition today between converters is tremendously keen, not 6705 only between du Pont and Sylvania converters, but between du Pont converters."

Now, how in the face of their proportion of business, in the face of the growing number of converters coming into their system, and in the face of concrete proof of actual competition can this theoretical charge of monopolizing markets be bandied about?

Let us go down a little further in the facts. I am still dealing with this group of exhibits, your Honor. Two of du Pont's principal converters were Shellmar and Dobeckmun. Exhibit 414 shows that for the period 1942 to 1947 both of those so-called exclusive promotional converters were among Sylvania's ten biggest customers.

Mr. **Minicus**. I would like to have the record show in that regard, your Honor, that that was the war period.

Mr. **Gesell**. You have testified to that, Mr. Minicus, six times, but there is no evidence.

Mr. **Minicus**. I am simply asking that the record show that that was the war period and that there were purchases of war materials that du Pont could not produce at the time.

Mr. **Gesell**. There is no evidence of that.

Mr. **Minicus**. I think the exhibits are replete with it.

Mr. **Gesell**. I will wait for the citation of pages.

Now, your Honor, what is the next fact? Sylvania took converters from du Pont, as exhibit 5046 shows: They took 6706 American Paper, amounting to 400,000 pounds; Hertz, 180,000 pounds; Union Bag, 450,000; and others that are listed in that exhibit.

Let us take another look at this monopolization of marketing outlets from a little different point of view. Three of du Pont's converters, Milprint, Shellmar and Dobeckmun, if your Honor please, in 1940, the year for which the figures are offered by the Government, accounted for 11,800,000 pounds of the total of 15,500,000 pounds of all of du Pont's converter sales through promotional converters. That is roughly at least 80%—11,800,000 against 15,500,000: These three companies, Milprint, Shellmar, and Dobeckmun, and yet the evidence shows that those three concerns became converters of du Pont in 1927 and 1928, before Sylvania was even in business. About monopolizing converters, the three main men accounting for more than 80% of this business were converters that were developed and worked with and made arrangements with before Sylvania was even heard of on the face of the globe.

6707 Let us look at it from another point of view: monopolizing market outlets. What would be the first question that would come to any reasonable man's mind if that charge was made? In my view it would be: How many outlets are there? If duPont monopolized them, how many does it have of the total number? There is not a scintilla of proof as to the number of converters there are in the United States, so we don't know whether duPont has five per cent, twenty per cent, or what per cent it has. And all through the country, your Honor, as these exhibits show, are people who are converting paper and other materials, who are competent printers of materials, and who are all potential converters, if Sylvania had enough energy, initiative, ability and enthusiasm for this product to go out and develop them.

Mr. Minicus. I think that should be stricken, your Honor. There is absolutely nothing in this record to show that Sylvania did not have energy, enthusiasm or anything else that he wants to talk about to go out and develop them. He just pointed out that Sylvania had more indirect than they had direct five minutes ago. Now they have not got in there enough to build it up. He can't talk out of both sides of his mouth. If we restrict ourselves to evidence, your Honor, these statements won't come in.

Mr. Gesell. This next thing, your Honor, is this, and

6708 this is a significant point, that this evidence shows that these converters were handling other lines of business as well as cellophane, in many instances. Their letterheads and things your Honor has not seen as we have romped through this mass of material discloses that. They had, in other words, other sources of supply which did not make them dependent upon duPont for the conduct of their business. So we have no proof of any monopolization of the outlets, and I guess what we come down to is therefore a question of intent. The absence of any facts except casual documents that do not show anything but the reverse of monopolization perhaps has some significance as to intent.

Now, why did duPont have a selective distribution system in promotional converters? That is the remaining question. I would like to read from Exhibit 5047, starting at page 4559. This report, which again the Government says is one of their key exhibits, says this:

"Since the beginning of our business we have chosen the selective policy, believing it to be best fitted for our particular type of

If duPont's own prices are non-discriminatory and fair, then Sylvania will meet the competition or not. But the first thing to show is that the prices were discriminatory. Mr. Minicus says he does not have to show that. There is no showing of it.

Mr. Minicus. I never made that statement. I did not make the statement that the prices were not discriminatory. I think the differences in the discounts shows the discrimination in the price. There was a different price for goods of like grade and quality charged to different purchasers. There is no question about that, never has been, and I never made a statement to the contrary.

6713 Mr. Gesell. A discriminatory price, your Honor, must be something more than that.

The second thing he must show is that this had a competitive effect in this monopoly case of doing what is claimed to be the channeling of business to duPont. We have it in evidence that Sylvania had the same kind of distribution system of converters, fabricators, jobbers, agents, et cetera. We have it in evidence that they had discounts. The Government appears to concede that their discounts were the same, but whether they were the same or different, there is no evidence as to what they are. For all we know, Sylvania may have been offering larger discounts. I tried to find out from Mr. Hamburg when he was on the stand. He said, yes, they had discounts, but he couldn't remember what they were.

Now, if our system of pricing to converters and fabricators and agents and jobbers channeled business to us and injured Sylvania, doesn't there have to be a showing of some effect, of some injury?

The Court. Well, that is the question I asked yesterday, and the answer I got was that it was not necessary to show that, and then there was a reference to F. T. C. versus Morton Salt. Can you help me on tha[illegible]

Mr. Gesell. That was a quantity discount case, your Honor, and when this issue came up and your Honor asked the question, it was addressed to Mr. Renninger, who was dealing

6714 with a different theory of violation of the Robinson-Patman Act. It was not addressed to Mr. Minicus, who was dealing with the primary level theory as opposed to the secondary level theory.

Mr. Minicus. I think that I would like to have the record show that it is Mr. Gesell's opinion that Mr. Renninger and I were approaching this thing on different theories. Mr. Renninger and I have worked this thing out for many months, your Honor, and we have not been in disagreement at any time on what the theory of these facts is that are presented.

Mr. Gesell. If page 3571 of the transcript can be squared with Mr. Renninger's opening on this subject, we will be glad to hear from Mr. Minicus about that at some future time.

Mr. Minicus. Will you tell us the line on 3571 so we can find it? We have waited for you in the past.

Mr. Gesell. I read it a moment ago.

Our position here——

Mr. Minicus. Do I understand we do not have time to look at the record?

The Court. You have all day to look at it. Let him finish his remarks and answer him in an orderly fashion. It is not helpful to me to have all these constant interruptions.

Mr. Minicus. I don't like them either, but we have to correct the record for mistakes and misstatements of facts.

The Court. He has given you the pagination. You read it
over. If you say that does not say what he says, then
6715 at the proper time get up and answer him.

Mr. Minicus. He is passing on to a different subject. May I point out to your Honor, at least a dozen times in the course of this trial there were requests to us to wait while he had found the place we were at. We have done that courteously every time. This is the first time the Government has made such a request. There is a question about this transcript, and we would like to follow it rather closely.

The Court. All right. What is the page?

Mr. Gesell. The page is 3571, and the statement is, "We don't care what happened at the second level. It is beyond the scope of our allegations." That is in no way consistent with Mr. Renninger's constant reiteration here yesterday that this was an arbitrary classification as between fabricators and converters and that we were discriminating in favor of the promotional converters and against the user and against the fabricator because of differences in price, and perhaps there has been a great deal of discussion among the gentlemen, but it has not reflected itself
in the courtroom.

6716 A second issue, then, to deal with is the issue of discrimi-
nation on the second level. Mr. Renninger's theory as opposed to Mr. Minicus' theory. There, your Honor, we established functional discounts. We established a functional discount for converters and a different functional discount for the fabricators and no functional discount for the industrial users.

Now, the first thing your Honor must have clearly in mind is that both the regular converters and the promotional converters obtained the same functional discount. There was no difference in price as among converters. Whenever a converter, a man who made a completed package of cellophane, bought cellophane he got a functional discount. His was higher than the discount to the fabricator who made straws or who made Christmas garlands and items of that kind.

* * * * *

6718 As far as effect is concerned, your Honor, the Government has conceded they have no proof as to effect. That is all theory. Well, then, what about intent?

Mr. Minicus. May I ask for the point of that concession in the transcript?

Mr. Gesell. Yes, I will give it to you, because I am glad you considered the concession. We will have it for you in just a minute.

It is at page 3556 and 3557 where Mr. Renninger in response to questions of the Court said, "We are not going to show any actual restriction of Sylvania itself in reference to their production and sales," and there is a further colloquy discussing the question of whether this is to be entirely theoretical or whether it is to have content.

Now, on intent, your Honor, we have here, it seems to me, clear proof that there was no improper intent, because here was letter after letter after letter of the salesmen putting these various
6719 problems up to the lawyers, the lawyers conscientiously
considering and revising in the light of the changes in this very abstruse and difficult statute, and compliance by the company with the suggestions of the lawyers. This case, your Honor, on this issue is one of the most extraordinary cases of inference and theory that we have had. I would like just for a moment to suggest to you what it is they are asking your Honor to infer on this point without proof. They are asking you to infer, first of all, that Sylvania did not have the same or greater discounts. There is no proof. They ask you to infer it. They ask you then to infer that if Sylvania did have the same discounts they didn't have sufficient capacity to serve the business. No proof. The proof that we have shows that Sylvania did not utilize all its capacity, and the proof we have shows that they had much business they could have put into conversion if they wanted to. Third, they ask you to infer that injury is probable even if they had the same discounts and capacity to service the converters. No proof. Then they ask you to infer that price differences were the reasons that duPont had more converter business than Sylvania; putting all to one side questions of difference in quality, questions of difference in service, questions of difference in promotion, questions of the advantage duPont got from being there first, years ahead of Sylvania, being the pioneer, and other considerations of that kind. Then they ask you to infer that Sylvania could not

develop converters from the large group of people who
6720 may have been available. Then they go one step further
and they say, "We want you to infer that the garment bag competed with the peanut bag and that peanut bags competed with straws." Somewhere in here some man's reason must have to intervene.

Then they ask you to infer that the advertising allowances were not proportionally available on equal terms. The contracts on their face show they were, but the constant statement is made "No, they were not." No proof, no facts.

Then they say this, and both of them say this together and separately: That the promotional converters were favored by vastly different extra services. No proof. Not a scintilla of evidence that the service given one group was different than the other. It was constantly stated, but there was no document offered. There is one that they put in, your Honor, which shows that we suggested to a promotional converter a possible man for employment, and then a few exhibits earlier they had a document showing we suggested the same man to a regular converter; and they have another example that we sent some people some Saturday Evening Post advertisements. There is no proof that we did not send them to others. Then they had this food locker thing which on its face shows it was sent all over the United States to every kind of person, and say that is an example of special service to promotional converters. They have no proof at all. They concede that there was service to both, and they ask
your Honor to infer, again without any proof.

6721 Now I want to come to the label. I showed your Honor
an example of that label at the back of the folder, a red, white, and blue label bearing the designation "Du Pont Cellophane." The first thing we hit there was a complete misapprehension by the Government as to the evidence they had offered themselves. The statement was made by Mr. Renninger on several occasions that regular converters could not use the label. That is not the fact. The regular converter contract, Paragraph 3, Exhibit 5420, shows that they could use the label subject to the regulations of the company, and those regulations, Exhibit 5373, which are regulations, as it is stated in the first sentence, for all customers, any customer, are the regulations that permit the regular converters or promotional converters to use the label.

So the initial premise of the presentation is faulty.

Second, Mr. Renninger said, "Why, they should have been allowed to use the Du Pont label on material made with Du Pont cellophane and the Sylvania label on material that was made with Sylvania cellophane." I never heard of any Sylvania label.

There is no proof in the record that there is any Sylvania label. I have never seen a Sylvania label. But why should they be permitted, whether there was or was not a label? Apparently Mr. Renninger feels they should be, but the cases are legion, your Honor, that the owner of a label must subject it to inspection and controls or he loses his proprietary right. That
6722 has been held in this Court and in other courts on many, many occasions. Judge Morris' decision in the Coca-Cola Bottling Company case in 269 Federal and the Knight case in 283 Federal 816 and many others. It is all set forth in the law of Unfair Competition of Nimms and other places which we can cite if your Honor wishes. The proprietary interest in the label is lost unless the owner of the label in licensing it takes care that it is not deteriorated or diluted. Du Pont undertook to be sure that there was no misleading advertising of the label by its licensees in a way which would attach the Du Pont name to Sylvania's inferior product. Now, everybody could always say, your Honor, that a product was made with Du Pont cellophane. That apparently does not satisfy Mr. Renninger: But anyone could say this batch of stuff is made with Du Pont cellophane and this batch was made with Sylvania cellophane, but he could not put the label on it, and the record shows that this red, white, and blue label had a large advertising value and was a thing of importance that had been built up and developed by Du Pont, and these are the ordinary, accepted, standard methods of protecting a label.

And so, your Honor, we come down, as we have in many of these other cases, with wholly lawful conduct, and the issues that remain under the Aluminum doctrine are issues of intent and issues of effect. There is no illegal intent that we can see in using
6723 accepted distribution methods and carefully following the advice of counsel as to how to avoid discriminatory pricing under this abstruse Robinson-Patman Act; and as to effect we now have it on the record that the Government has conceded that their theory is one of pure theory based upon inference, upon inference, upon inference and a false premise and that they are not going to make any effort to show any restriction of Sylvania, and none can be shown.

Mr. Renninger. If you Honor please, as I stated previously, it is the Government's contention that these agreements between a dominant supplier and dealer which foreclose a substantial segment of the market from competing suppliers and which deny dealers access to said suppliers are unreasonable restraints of trade under the Sherman Act, and agreements which have the potential of accomplishing this, even if they actually do not, are violative of Section 3 of the Clayton Act.

* * * * *

6747 The Government introduces into evidence Government Exhibit 5539. This is an inter-office memorandum from Mr. C. F. Brown to various district managers, dated December 9, 1942.

(Inter-office memorandum from Mr. C. F. Brown to various district managers, dated December 9, 1942, was received in evidence and marked, "Government Exhibit No. 5539.")

Mr. Renninger. He states:

"In connection with our postwar program, we are anxious to study"——

Mr. Gesell. The heading has to be read to understand the exhibit, your Honor.

Mr. Renninger. "Discount to Paper Jobbers"—I might say, your Honor, that the jobbers used to sell cellophane and also sell other articles like paper or——

Mr. Gesell. Glassine.

Mr. Renninger. I don't know about glassine.

Mr. Gesell. This says waxed paper and glassine in this exhibit.

Mr. Renninger. Anyway, they sold other articles of commerce, your Honor, just like a hardware store would sell various other types.

6748 "In connection with our postwar program, we are anxious to study the paper jobber as an outlet to service the smaller accounts.

"At the present time, he had little incentive to sell our product because he cannot sell in case lots and is restricted to the smallest trade.

"We might consider the advisability of putting the jobber in position to sell small case-lot users and fixing a limit on the size of trade he could handle. This could be done by establishing, say a 'ton-lot' price as our minimum price and continuing the 500 lb. price the next time we make a price reduction.

"What margin would the paper jobber be satisfied with between his 2,000 lb. price and the 500 lb. price, bearing in mind, of course, that a large portion of his business would be sold at the 100 lb. price which now gives him 8¢ or 16%—and he makes 20¢ or 33% on the less than 100 lb. price?"

The Government introduces into evidence Government Exhibit 5523——

Mr. Gesell. Your Honor will note that the next two paragraphs are very significant in this exhibit and have not been read.

Mr. Renninger. Government Exhibit 5523 is a memorandum from C. F. Brown to V. C. Clark, dated April 9, 1943, subject "Jobber Policy."

6749 (Memorandum from C. F. Brown to V. C. Clark, dated

"If we cared to proceed in revising our practices along the lines of these figures, they likewise, saw no objection to that and felt in either case we were on solid ground."

There is in that last statement, we submit, a very definite inference that at least the pricing practices at that time are not entirely in accord with this cost analysis that Mr. Hatt has worked out.

Mr. Gesell. I certainly sometime would like to know what the issue is we are litigating, your Honor, whether Mr. Haskell and Mr. Abrams were good lawyers, whether the Supreme Court agreed with them, or whether it did not. I just don't understand
what the issue is we are addressing ourselves to, and if we
6902 can get it cleared up by four o'clock, then perhaps I can deal
with it tomorrow.

Mr. Minicus. If the issue has ever been clear in this case, I think it is crystal clear now. As a matter of fact, your Honor, the issue happens to be in response to a question raised by the Court, that is, that there is no cost justification for these quantity discounts. And I don't care whether Mr. Gesell intends to show it or not; I do.

Mr. Gesell. There is no claim that there is. I don't understand what we are trying to come to grips with. We have never asserted any such claim, your Honor.

Mr. Minicus. The plaintiff has asserted it in its complaint and intends to prove it.

Mr. Gesell. What difference does it make whether there is or isn't? It has nothing to do with the legality of the discounts.

Mr. Minicus. It doesn't?

Mr. Gesell. No.

Mr. Minicus. Well, we believe it does, very definitely.

Mr. Gesell. You Honor, I will quiet down, but we have just got pages and pages of this stuff and I don't see what it relates to.

Mr. Minicus. Not only is this stuff important to the cost justifi-
cation, but I think when we are through with this stuff we
6903 will see entirely how the discount system works. But I do
say here that this evidence does bear most directly on the
cost justification factor, and I insist, your Honor, that it is extremely important in any price discrimination case.

The Court. Well, is this one of the items that you allege under paragraph 22 of your complaint?

Mr. Minicus. It is alleged in our complaint in paragraph 37, I think, your Honor.

Yes, it is paragraph 37, sub-heading (d). The beginning of the paragraph reads, "Du Pont has adopted and employed numerous unfair sales practices, some of which are in themselves unlaw-

April 9, 1943, was received in evidence and marked, "Government Exhibit No. 5523.")

Mr. Renninger. (Reading.) "I have noted with interest your attitude towards the jobber as an outlet for Cellophane and cannot quarrel with your basic reasoning.

"Let's admit he cannot or will not do a promotional selling job to develop new business—that all he can be depended upon to do is to ask for orders.

"On that assumption, how can he be best utilized and what inducements does he need to get his cooperation and activity?

"To be more specific, will you please give me your answers to the following questions:

"1. Should the jobber be placed in a position to sell in 500 pound lots?"

And various other questions similar thereto.

The Government moves into evidence Government Exhibit 5174, which is an inter-office memorandum from Mr. V. C. Clark to C. F. Brown, dated April 14, 1943, subject "Jobber Policy," reference your letter April 9, 1941.

(Inter-office memorandum from Mr. V. C. Clark to C. F. Brown, dated April 14, 1943, was received in evidence and marked, "Government Exhibit No. 5174.")

6750 Mr. Renninger. (Reading.) "My opinion as to your specific questions are:

"1. That we should not place the jobber in a position to handle business in 500 lb. quantities for reasons covered in my previous letter.

"2. That we should continue present jobbers. We should, however, through promotional work sell them on the importance of their handling less than case lot business from a profit point of view with the idea of having them eliminate case lot sales as soon as our promotional work starts paying them dividends."

A good description of the background and history of duPont's distributors is contained in Government Exhibit 5544, which the Government now moves into evidence.

* * * * *

6820 There was introduced yesterday one document which I wish to consider in some detail, because I think it completely answers the question on intent. First, it was suggested by one that was called to your Honor's attention at the time, Exhibit 5539 relating to the discounts to paper jobbers, and when we got half way down the letter the reading stopped on the Government's side; but if there is any question as to what was determining those discounts you only have to read the next two paragraphs of that document, for the inquiry is "What is the discount setup on glassine and waxed paper? What is his percentage of gross operating cost to gross sales?

"It would be helpful if you could talk with your friends among the jobbers and paper manufacturers and develop information along these lines without, of course, indicating our own direction of thinking."

We were seeking to move into the established paper jobber trade on a basis which would sell cellophane.

Now let us look at the exhibit to which I referred a moment ago, Exhibit 5544. This is a memorandum dated June, 1943, from Mr. Brown, who is a Sales Manager, to Mr. Hines and
6821 Mr. Hatt called "Post-War Sales Policy and Organization," a policy document reviewing the question of the company's tactics and strategy and position with respect to the distribution of cellophane.

First of all, what does he start out with? This monopolist, this restrictive seller. He starts out in the memorandum under the heading "Competition," and he says, "We will enter the post-war period with a more difficult competitive problem. Post-war competition will be keener and broader. Sylvania will face the same situation that we do. The paper manufacturers from whom we must take our sales increases will make every effort to retain the business they have established during the war.

"Additional capacity for competitive transparent films will come in during the second year after the war. Not only Sylvania, but Goodyear, Dow, Monsanto and others are preparing to go after the market on a more substantial basis—and we can probably look for broader competition on viscose films when our patents expire.

"In spite of these problems we have confidence we can maintain our position of leadership and attain our objectives with a proper and adequate program and organization which we are outlining in this report."

The Court. Was Mr. Brown there referring to these other companies such as Goodyear, Dow, and Monsanto entering into the cellophane field as such or entering into the field of substitute materials to create the competition?

6822 Mr. Gesell. He is talking about their sales of other materials that compete with cellophane.

The point I am making, your Honor, on this issue of intent is the fact that this distribution plan was formulated and considered in relation to a highly competitive situation in an effort to enable duPont to compete and not to develop and maintain a monopoly.

We can go on in this memorandum and I think it will become more apparent.

On the question of direct sales the memorandum states:

"After consideration of other methods of selling and distribution, we have concluded that for the period immediately following the war, there is no other safe course than very aggressive, direct selling to the actual users and prospective users of our product."

Then he takes up jobber distribution, which is one of the questions we have on these documents.

"Our jobber policy (outside of Catty, Brooks, Zellerbach), has confined jobber distribution to the small trade in less than case lots.

"We have carefully considered an extension of jobber distribution to the larger trade and are convinced that such a plant would be costly and hazardous in the immediate post war period for the following reasons:

6823 "The jobber carries hundreds of lines, continually competing for his interest and the selling time of his salesmen.

"A jobbing operation is essentially a service rather than sales promotion activity.

"Cellophane still needs promotional selling, if only for the reason it costs twice as much as its major competitor, paper.

"The jobber salesman is not trained to do promotional selling.

"The jobber handles our major competitive material, paper—his business is largely built on sales of paper.

"We recognize the need of further training for our own men but could never approach similar training with jobber men.

"If the jobber were in a position to sell in case lots, he would immediately solicit business already established by us. Every such account he took would cost us money.

"The greatest number and varieties of films make it impossible for us to insure use of proper films sold through jobbers.

"We lost control of business placed through the jobber unless we contact his customers ourselves at double expense. As we expect more competition post-war, it would be hazardous to depend on someone else to hold or develop it for us.

"For these reasons, we cannot see how we can expect the jobber to do a better job in building our business than we can do ourselves."

6824 And so we talk about going out and doing the promotional job ourself in order to enter more completely this competitive market. Can that kind of discussion be reconciled with the statement that we were going out and tying up and binding and restricting different outlets in order to perpetuate a monopoly? We were looking at the distribution terms of how we best could promote this high-price specialty against the competition.

The document goes on and analyzes the paper jobber trade and the discounts allowed there and compares our discounts with that to see how we are. It says we are going to put men out to look into it further. Then there is a heading "Direct Distribution to Users of Cellophane," which analyzes it from the same point of view. It says, for example:

"Many converters have other materials to sell than ours—glassine, foil, competing transparent films. War-time shortages have resulted in greater converter activity in these directions. Post-war competition will probably continue this trend. We need to protect and develop our important business at the points where it is used—whether the customer makes his own bags or buys fabricated bags is essentially immaterial—and may shift at any time."

Again emphasizing that we were going to go out and do the promoting and developing of this business ourself. There is no talk there in terms of corralling a group of converters 6825 and giving them a preferred position and stopping them from competing. This is very full of competition and all kinds of people are competing for their business, and we must go out and sell it ourselves in a promotional way, and if we can steer a customer to a converter who buys our goods, so much the better. All of this is wholly inconsistent with the notion of the Government that this was a regimented, carefully controlled, hog-tied distribution system by a lazy, fat monopolist desiring to maintain a position. It is full of competitive talk; it is full of promotional selling from start to finish.

Take a look at what they say about converter sales in the same document:

"We are planning now for an expansion of our converter distribution post-war—both in numbers and geographically—particularly to prepare for convenient national distribution to service our largest market—the baking industry.

"It is therefore planned to assign additional salesmen, trained for regular converter contacts—probably 4 instead of 2.

"One of our major converter problems has been the development of low-cost printing.

"We have lost considerable tonnage in the past to low-cost competition.

"In addition, our chief objective product-wise post-war is white bread where cost is the controlling factor.

6826 "Within a short time an experienced cost engineer from one of our plants will be assigned to spend his entire time to develop methods of reducing the cost of printing Cellophane.

"Greater Management and staff attention, as well as greater man-power in the field is needed to control and develop our conful including, among others, the following:—" then down under (d), "Fixing an arbitrary and discriminatory discount schedule for sales of cellophane and caps and bands to users, converters, and distributors, in such manner that price differentials on orders of varying quantities were not justified by actual savings in cost to the defendant."

The COURT. All right, proceed.

Mr. MINICUS. I don't understand—this business of cost justification is one of the few defenses that are provided to a price discrimination.

Mr. GESELL. You have to prove the discrimination before you get to the issue.

Mr. MINICUS. I submit, your Honor, that the discrimination has been proven. There have been sales to a great many different customers at different prices of goods of like grade and quality in interstate commerce. 6904

I continue reading:

"I set forth to them we had felt that probably the time had come to reduce the size of our discounts more in keeping with what these analysis of cost figures show, and to establish us on a basis of perhaps a maximum quantity discount of 5% rather than 10% and in doing so, to revise our list prices so that the important trade that have gotten the longer discount would not pay a greater net price under the new proposed schedule than they now do."

There again we have another reference to that important trade.

(Reading.) "There is one serious objection to this from our own individual point of view, and that is it will substantially reduce the average price to small and medium sized trade much more in proportion than it will to the large trade and will reduce our average price received very substantially. I had figures we could afford to do this, perhaps on the basis of earnings and in line with our policy to reduce the price as cost permitted, but in view of the present cost position today and the outlook for substantially higher prices for glycerin as well as further advances in labor and some of the other miscellaneous materials, it seems questionable in my mind, whether we should attempt to reduce the figure to the small and medium trade.

6905 "Our figures on earnings are sometimes deceptive because they do not take into consideration the Federal and State taxes and the undistributed expense from Wilmington. On our summary sheet at the end of September we showed a percent of return on a yearly basis for the nine months to date of 27.6%. This, however, is before the deductions mentioned above and when these are taken into consideration, this figure declines to 21.06% return for the nine months' period.

verter business post-war, particularly due to increased number and improved quality of competitive materials."

Well, is any of that monopoly talk?

The Government has failed to grasp the essential fact of this business, that this was a high-priced specialty item trying to enter as a substitute for established materials in a very active and competitive trade.

* * * * *

6845 Mr. Minicus. Another form of quantity discount is the volume or cumulative discount schedule. This is based upon purchases made over a specific period of time and having various brackets of requirements for discounts related 6846 thereto. Under this system it is customary to rebate the amount earned according to quantity purchases at the end of a specified period. In addition to the quantity discounts previously discussed, which for clarity we shall refer to as the price list discount, the defendant also operated under a volume or cumulative discount schedule. This is exemplified by the following documents:

The Government offers in evidence Government Exhibit 5522 at page 6312.

(The letter and attached rider agreement from O. F. Benz dated October 28, 1935, was received in evidence and marked "Government Exhibit No. 5522.")

Mr. Minicus. The first page of this exhibit is a covering letter from a Mr. O. F. Benz, Director of Sales, dated October 28, 1935. The covering letter announces a new schedule of what is called here "bonus discounts effective November 1, 1935." We shall see that the schedule initiated at this time is the one with which we are primarily concerned, because it remained in effect for eleven years, down to approximately December 31, 1946.

On the second page of this exhibit or page 6313 of the bound volumes we find a form of agreement rider captioned "Du Pont Cellophane Company, Inc." This form of rider states:

"Effective dates: —————— to —————— incl. It is further understood and mutually agreed that the Schedule of Discounts as shown in the Agreement is to apply on pur- 6847 chases covered by invoices dated from —————— to October 31, 1935 inclusive, and that the schedule given below shall apply to invoices dated from November 1, 1935 to ——————. The total net purchases during the entire period of the agreement shall determine the discount earned on each schedule."

Then follows a setting forth of part of a schedule.

I continue reading: "Schedule of Discounts effective November 1, 1935:

On purchases over $10,000 and less than $50,000, 2½%.
On purchases over $50,000 and less than $100,000, 2¾%.
On purchases over $100,000 and less than $150,000, 3%.

Then there is a blank space below this part of the schedule, apparently left there to provide additional brackets, as we shall see. We will note, however, from the part of the schedule just given that as the purchases over the specified period increased in $50,000 brackets the discount allowable increases accordingly one quarter of 1%.

I continue reading at the bottom of the page:

"Example. If net purchases from original date of agreement up to October 31, 1935 amount to $30,000, and net purchases from November 1, 1935 to expiration date of agreement amount to $25,000, total net purchases during the entire agreement would amount to $55,000, which establishes a discount of 2½% on $30,000 ($750.00) and 2¾% on $25,000, ($687.50)—a total bonus payment of $1,437.50."

6848 This then sets forth a volume or cumulative discount schedule based upon purchases made during a specified time, in this case one year, and having various brackets of requirements of purchases and certain designated discounts relating to each specific bracket of purchase.

The Government offers in evidence Government Exhibit 5033 at page 5221. This is correspondence from Mr. Charles F. Brown to certain persons in the Sales Department of the du Pont Company and is dated February 28, 1946.

(The memorandum from C. F. Brown to J. E. Dean et al., dated February 28, 1946, was received in evidence and marked "Government Exhibit No. 5033.")

Mr. Minicus. (Reading.) "Subject: Quantity Discounts.

"For some time, we have been considering reduction of our maximum discount from 10% to 5%. This is more necessary than even, when permissible, due to our rising labor and material costs.

"When discussing change in quantity discount schedule, we had tentatively decided to recommend, when the time came, retention of present schedule up to the $500,000 bracket, providing maximum discount of 5% (Plan A). The only change in customer price involved would be reduction to 5% of six accounts—Liggett & Myers, American Tobacco, B. & W."—I understand that is Brown & Williamson—"R. J. Reynolds, Continental Baking and A. & P., based on 1941 purchases."

6849 Your Honor will note as we go through here that 1941 is quite generally used in all of their statistics and estimates as the year on which these things are based.

"Only Liggett & Myers, American and Reynolds earned over 5% in 1945. One advantage of this is no change with all other direct accounts. On the other hand, it is discrimination against a few."

In all fairness, there I don't think they mean the discrimination of the law. I think they mean this change will cause a certain few to get a less advantageous price.

"We are now suggesting consideration of an alternative schedule (Plan B) which would reduce the discounts in all brackets to a varying degree. The advantage in this is that the large accounts would not take all the rap and the change with the other accounts is small. It also provides a greater saving to us."

Here is where we begin to notice this continual reference to these large accounts, the important trade, all the way through here.

"Comparison of both plans showing savings is given below, based on 1941 sales and distribution. In both plans converters, Brooks and Catty are reduced from 10% to 5%. Zellerbach is omitted, to be treated as a separate problem."

Then on the third page of this exhibit or page 5223 we see set forth a table under the heading "Quantity Discounts" 6850 and again I point out to the Court that this as distinguished from the price discount is the cumulative discount schedule, and here we have it in complete form ranging all the way from purchases of $10,000 up to those of $1,500,000. Thus we see 10 to 50 is 2½%; 50 to 100,000 is 2¾%; 100,000 to 150,000 is 3%; and the schedule goes up in regular progressions adding one-quarter of a percent for each $50,000 increase in purchases over the year's period, until we arrive at the ultimate where the purchases would be $1,500,000 and up, at which point the rebate on this quantity discount schedule would be 10% of the purchase price paid.

Now, in order to qualify for the cumulative quantity discount, purchasers of cellophane customarily executed with the du Pont Company an agreement wherein the various discount brackets were set forth, and in the lexicon of the company such purchasers were designated as agreement accounts.

* * * * *

6855 Mr. Minicus. Now, before I reverted back, I was discussing the discount agreement accounts whereby people who qualified for these cumulative quantity discounts signed an agreement with the du Pont Company covering it.

Government Exhibit 5023 has previously been offered in evidence. I will just refer to parts of it and not the entire thing as it was previously covered in some detail although not completely read. This is a document dated June 21, 1944, and is unsigned, but it is preceded by a covering letter from Mr. Brown to Mr. Richards, under the caption "Quantity Discounts Post War."

6856 (Reading.) "Distribution of agreement accounts : large in number at the bottom of the schedule, very thin at the top. In 1941 two hundred purchased $10,000-$25,000." They are speaking entirely of cellophane here.

"53 purchased between $25,000 and $50,000.

"24 purchased between $50,000 and $100,000.

"21 purchased between $100,000 and $500,000.

"8 purchased over $500,000."

Then it shows that the total agreement accounts they had at that time was 306, and it states that a complete tabulation it attached.

Mr. Gesell. I don't think that is correct. That is the total people who purchased in the quantity brackets, not the total number of agreement accounts.

Mr. Minicus. Well, there are no other brackets than those set forth here, so it has to be the total number of agreement accounts.

Mr. Gesell. There are people who purchased under $10,000, Mr. Minicus.

Mr. Minicus. They do not have quantity agreements.

Mr. Gesell. We dispute that, your Honor, and there is no proof that they do not.

Mr. Minicus. I think the proof will be along in just one moment, sir, if you will be patient.

Mr. Gesell. It is always coming.

6857 Mr. Minicus. Yes, we have come to this point now that you didn't think we would come to.

(Reading.) "The proposed schedule—" and this again is discussing a proposed schedule and I am introducing it at this time to show certain thoughts that are current in the minds of the company when they [illegible]e speaking about discounts, not that this proposed schedule wa[illegible] ever put into effect—"The proposed schedule of two through five percent will provide a lesser number of brackets than the present two through ten percent schedule."

Then it goes on to discuss certain benefits to the defendant accruing from these agreement accounts, that is, from having these accounts sign agreements.

Continue reading: "The sales group believe that the new brackets should be set up with the above distribution of accounts in mind in order to obtain the benefits of an agreement with the greatest number of accounts."

It says right here that the purpose is to get an agreement with the greatest number of accounts in this bracket.

Continue reading: "These benefits are:

"1. Concrete evidence to the customer that he is buying on the same schedule and terms as the largest account. We feel this is of considerable practical sales value.

"2. Formal association with du Pont. Experience has shown that the agreement forms the basis of a closer working association with the customer.

6858 "3. A somewhat more favorable competitive position. The agreement has a psychological effect in deterring competitive purchases, even though the competitor's proposition may involve no loss in dollars."

I invite the Court's particular attention to that, that one of the things involved here, according to the du Pont Company, is the psychological effect of these agreements with the customer.

Continue reading: "The lower brackets include the largest number of customers who have potential for growth into the higher brackets. There is a much larger number of accounts which in normal times buy from 5 to $8,000 to which the two per cent discount will be an incentive, and sales aid to us. This will be particularly true during the expansion of the bread market post-war.

"For these reasons the sales group favor the retention of $10,000 as the minimum agreement discount bracket."

Now, there we have it that the agreement discount bracket ends at $10,000, and I read in that schedule a moment ago the discounts from $10,000 up to $1,500,000.

"It is interesting to note that, since the original agreement schedule—" there it is again—"was set up on MT in 1928, poundage necessary to qualify at $10,000 has increased from 7,560 to 24,400."

6859 That is because of the decrease in price; you have to buy more cellophane to qualify for an agreement account at $10,000.

"From the legal point of view, we can show considerably more than two per cent reduction in cost in field selling expense alone with accounts buying $10,000 and up versus all others.

"If the bottom bracket was moved up to $25,000, we would lose 200 out of 306 agreement accounts * * *" what do they mean? Apparently you have to come under this schedule to get an agreement. Continue reading: "* * * and make it much more difficult to acquire new ones from the group to which we look for growth.

"We also feel there is less need for many brackets on the top end of the schedule due to the extremely thin distribution of accounts.

"We have only four accounts over $1,000,000—all cigarette accounts. We have eight accounts over $500,000, including all of the 'Big Six' cigarette companies. There would seem to be some virtue, therefore, particularly from the Robinson-Patman angle, in setting up 'over $500,000' as the top bracket; thereby putting all large cigarette accounts on the same discount."

Now, I agree with Mr. Gesell, that was never adopted. I also
point out here that for the first time in these documents we
6860 begin to see a very broad implication that something is
wrong with this present discount schedule.

Mr. Gesell. Now, just a minute. The Government has in its possession Mr. Abrams' opinions with respect to this matter given at this time, and they are completely explanatory of this problem, your Honor, if they choose to offer them.

Mr. Minicus. Mr. Gesell knows very well that I am going to read those opinions in just a few minutes.

Mr. Gesell. I haven't any idea what you are going to offer in your case. You haven't offered as much as sixty per cent of the things you said were of minimum essential at the beginning of the case.

Mr. Minicus. I still say, your Honor, that here is the first inference and awareness on the part of the du Pont Company that something is wrong with this schedule. What else can it mean when they say, "There would seem to be some virtue, therefore, particularly from the Robinson-Patman angle, in setting up 'over $500,000' as the top bracket"? I cannot find any other explanation of it.

Continue reading: "Several suggested schedules are attached for comparison and discussion.

"We doubt that the competitive angle has very much bearing on selection of the schedule we set up (provided, of course, they meet ours) as past practice has been to offer to pay whatever is necessary in order to cause no loss to customer in whatever portion of business is switched."

6861 There again is a reference to the Sylvania indemnification guarantee against loss that we saw earlier and that we will discuss at the proper time.

Turning now to page 8 of this exhibit, which is at page 1469, we have a table which sets forth the concentration of business of the largest purchasers of cellophane in the duPont Company, and this is a table of agreement accounts, expiring 1/2/41 to 1/1/42, and according to the caption the accounts set forth here are all the accounts in the bracket of $100,000 and up.

Thus we see that Ligget & Myers heads the list with 9½ per cent discount in that yearly period; that the dollars sales to Liggett & Myers for that year were $1,400,381.

Second on the list is The American Tobacco Company. Its discount for that period was 9¼ per cent on purchases of $1,385,996.

Now, referring to Government Exhibit 414, setting forth the ten Sylvania accounts over $100,000, it will be noted that Liggett & Myers never appeared on that list. The American Tobacco

Company, duPont's No. 2 account, does appear in later years on the Sylvania list. In fact, the exhibits show that in this year The American Tobacco Company purchased $265,000 from Sylvania against $1,385,000 from duPont.

The third customer on duPont's list is another cigarette
company, the Brown & Williamson Tobacco Company.
6862 Brown & Williamson in this year received 8½ per cent dis-
count on $1,230,000. Brown & Williamson does not appear
at any time on any of the Sylvania lists.

The fourth company on the duPont list is the R. J. Reynolds Tobacco Company. R. J. Reynolds in this period received 7¾ per cent rebate on $1,065,110. R. J. Reynolds, as we saw in previous exhibits, because of a dissatisfaction with du Pont quality did switch some of its business to Sylvania, and in this year, as against the $1,200,000 purchased from duPont, the list, GX 414, shows that they purchased $508,000 from Sylvania—less than half as much.

The fifth company on the duPont list is the Continental Baking Company. They received a discount of 6½ per cent on purchases of $787,806. Continental Baking Company never appeared on any Sylvania list.

Mr. Gesell. Well now, the list is of only the ten largest. When he says they do not appear on the list, it does not mean at all that they did not buy from Sylvania.

Mr. Minicus. I think I made that quite clear to the Court. I said that the listing of Sylvania in GX 414 is the list of ten accounts who purchased over $100,000.

No. 6 on the duPont list is The Great A. & P. Tea Company.
They purchased $525,882 worth of material from duPont and
received a 5 per cent discount. Now, the A. & P. Company
6863 also was in Sylvania's top ten at $358,000, and that account
will be discussed in some detail later.

I would like to correct that A. & P. account. That is $652,297.

Then follows the Philip Morris & Company at 5 per cent, P. Lorillard at 5 per cent; The Kroger Grocery & Baking Company at 4½ per cent and Loose-Wiles at 4 per cent. None of those companies appear at any time in any of the years shown as Sylvania's purchasers among the first ten.

Mr. Gesell. Well, Kroger appears.

Mr. Minicus. You find it, sir.

Mr. Gesell. It appears on 5616.

Mr. Minicus. I am having that checked, your Honor. We will see whether Kroger appears. It is my understanding it does not appear, but if it does appear, I believe it only appears once.

Mr. Gesell. No, it appears six times.

Mr. Minicus. All right. It is not important. I will accept that statement. Then Philip Morris, P. Lorillard Company, a cigarette company, The Kroger Grocery & Baking Company and Loose-Wiles, the last four of duPont's top ten, Kroger does appear; the other three do not.

Then we come to another group, the second ten, Purity Bakeries Service, who purchased——

Mr. **Gesell.** Just a minute, Mr. Minicus. Lorillard appears. I guess I will have to just indicate, your Honor,
6864 that this does not seem to jibe with the exhibit at all and we will have to check it.

Mr. **Minicus.** I am perfectly willing to have it checked, Mr. Gesell. In statistical compilations of this nature it is rather difficult, and I must concede that Lorillard does appear.

The **Court.** We will take our luncheon recess at this point.

(At this point a recess was taken until 2:15 o'clock p. m., of this same day.)

6865 2:15 O'clock P. M., the Same Day.

Present: As before noted.

Mr. **Minicus.** Your Honor will recall that as we recessed for lunch a confusion was beginning to develop, and I must take entire responsibility for it.

Mr. **Gesell.** What is that?

Mr. **Minicus.** I will take the responsibility for it, sir.

The **Court.** Who shared the confusion?

Mr. **Minicus.** There were some interruptions coming along that seemed to becloud the issue a little bit. I probably didn't make sufficiently clear—in fact I know I didn't—the fact that when I was comparing these very important leading du Pont customers with Sylvania customers and indicating those that were not on Sylvania's list that I had compared this list with the Sylvania list for the same period of time. In other words, this is a list from 1/2/41 to 1/1/42, and I took the Sylvania list from the year 1941, and I will concede to Mr. Gesell that the Krueger Company and Lorillard do appear on Sylvania's list for leading customers for other years; they do not appear for the year 1941. I took the year 1941 simply to make the comparison with the American Tobacco Company, and the Reynolds Company and the A. & P. Company as to amounts. My statement is
6866 correct that Liggett & Myers do not appear on Sylvania's list, nor do Brown & Williamson and Philip Morris.

Now, turning to page 11 of this report or page 4472 of the bound volumes we come to another tabulation compilation concerning this cumulative discount schedule. Again the discounts are set forth beginning at 10% at the top and running down to the 2½% bracket at the bottom, and in that third column of this table we find listed the number of customers who qualify under each of these brackets. For this particular year the first custome to qualify is at the 9½% bracket. In other words, there was on customer in this year who received the 9½% quantity discount and referring to the following page of the exhibit we readily se that that was Liggett & Myers, a customer who did not buy at al from Sylvania, whose name does not appear on the Sylvania list o ten.

The second customer who has the bracket below at 9¼% is th American Tobacco Company.

The third customer appearing at the 8½% bracket is only one Brown and Williamson.

We drop down there then to 7¾% bracket where there is anothe single customer, Reynolds. There is a single customer at th 6¼% bracket, and that is Continental Baking Company; and a the 5¾% bracket there is another single customer who I believ to be the A. & P. Company, and then we drop down to th
6867 5% bracket and find two customers. The other two ar the big six tobacco companies, Lorillard and Philip Morris.

Coming down further to the 4½% bracket there is one customer and there is one customer then at the 4% bracket.

So there are ten customers listed in this year at the 4% bracket or above.

We see then that there are five customers in here at the 3¾% bracket, two at the 3½% bracket, four at the 3¼% bracket, eight at the 3% bracket, twenty-four at the 2¾% bracket, and 253 at the 2½% bracket.

The Government at this time offers into evidence a series of documents that is a consecutive set of the du Pont discount agreements under the cumulative discount system with one of its customers, the R. J. Reynolds Company.

The Government offers in evidence Government Exhibit 5551, Government Exhibit 5552, Government Exhibit 5553, Government Exhibit 5554, Government Exhibit 5555, Government Exhibit 5556, Government Exhibit 5557, Government Exhibit 5558, Government Exhibit 5559, and Government Exhibit 5560. These exhibits do not appear in the bound volumes and we have prepared a set for the Court.

(The series of agreements between R. J. Reynolds Tobacc Company and E. I. du Pont de Nemours & Company were received in evidence and marked, "Government Exhibits Nos. 5551 t 5560," inclusive.)

6868 Mr. Minicus. Government Exhibit 5560 is typical of all of these agreements. What would be said of that applies equally to all of them.

On the second page of the agreement, the first page of the body of it, three-quarters of the way down the page, there is a heading in capitals "Special Quantity Discount: Promptly after December 22, 1946 the Seller agrees to give the Buyer a special quantity discount based on the aggregate value of du Pont Cellophane (less any cash discount, whether or not actually taken) invoiced by Seller to Buyer during the year, according to the schedule below:"

Then follows a brief schedule through the $150,000 bracket at 3%.

6869 Turning now to the last page of the agreement, we find there a rider which continues from $150,000 bracket all the way through up to the 10 per cent discount at $1,500,000 and up. On this final page of the agreement I direct the Court's attention to a statement that appears over the discount schedule. There is set forth there, "Purchases made by subsidiaries and affiliates listed below are to be included in the agreement referred to. If no subsidiaries or affiliates, please so state." In the case of R. J. Reynolds & Company there were no subsidiaries, but it is quite clear from the body of the agreement and the way the agreement worked in operation, as we shall see, that this quantity discount schedule, the cumulative quantity discount schedule, was not restricted to the purchases over the period of one year by a single buyer in the sense that that buyer was a single corporate entity. These were also extended and lumped together to subsidiaries or affiliates of the leading buyer, regardless of the location of his plant, whether he made orders at the same time that the parent company made orders or anything else. The entire purchases of the parent company, the subsidiaries and the affiliates were lumped together at the end of the year and the discount paid on the basis of those purchases. This series of contracts extends from 1936 through 1946, and it will be seen that the discount schedule set forth on the rider therein does not vary and has remained the same through all of those years.

* * * * *

6897 Mr. Gesell. Of course, I would think the issue would arise only where the defendant offered a defense based upon cost justification, which is not offered and will not be offered here. If we want to try that issue, it will take a lot of documents——

The Court. You remember my question was crystalized to an anti-trust suit and directed to that type of litigation alone.

Mr. Minicus. Yes, sir.

The Government offers in evidence Government Exhibit 5520 at page 6298. This is a letter from Mr. J. E. Hatt to Mr. L. A. Yerkes and B. M. May dated October 27, 1936.

(Letter from J. E. Hatt to L. A. Yerkes and B. M. May, dated October 27, 1936, was received in evidence and marked "Government's Exhibit No. 5520.")

Mr. MINICUS. I would like to say parenthetically now that in my opinion this series of documents that fellow gets really to the heart of the entire matter we have been discussing for the last two days. It is entitled "Price Policy, Robinson-Patman Bill.".

Mr. Hatt writes:

"Recently I reviewed with Mr. H. C. Haskell and Mr. S. L. Abrams of the Legal Department, at quite some length, the question of our price policy—particularly in relation to our present practice of working on a quantity discount basis, 6898 and discussed with them in some detail, our past practice, and what the differential in prices involved between various sized accounts, with the thought of getting their opinion as to how far we were out of line, if any, in connection with the Robinson-Patman Act."

In all fairness I would like to point out that this letter is 1936, shortly after the passage of the Act.

Mr. GESELL. The Act was effective in June, and this date is October, your Honor.

Mr. MINICUS. I think that is what I said.

Continue reading: "I pointed out in detail to them, quite a number of the various items as they are affected by variations in price on account of quantity of our material. Among these, was the item of cigarettes where the biggest differential we had last year between a large cigarette manufacturer and a small cigarette manufacturer amounted to 6.5% on the material employed. This was equivalent to just less than $.03 per pound of material which wraps from 720 to 800 packages of cigarettes, depending upon the size and the efficiency of the operation, and this material sells by the manufacturer for from $72 to $120 or more.

"There is not anything like this amount of differential between medium and larger sized cigarette manufacturers so that the cents per pound of Cellophane involved would be even less. In 6899 this case, Mr. Haskell said very definitely there could be no question of the merit of the defense that this is not sufficient to be regarded as a serious and substantial injury to a buyer nor does it create a monopoly or prevent competition.

"In the case of cigars, I pointed out that the maximum difference between small and large cigar manufacturers was not in excess of 3% which amounted to less than $.015 per pound of Cellophane employed, and which pound of material would wrap 1,000 cigars selling even in the five-cent class by the manufacturer for $35 or more. Among the larger manufacturers of cigars, there is either no spread, or it is substantially less than this.

"In the baking industry, in the case of wrapping special loaves of bread, the extreme difference amounts to 3% which is likewise less than $.015 per pound and which would account for the wrapping of 75 to 85 loaves of bread depending upon size, selling by the producer for from $4.50 to $7.50 and a unit of this size would represent the most pronounced differential per unit of sale wrapped.

"Both Messrs. Haskell and Abrams agree this is definitely not the degree of discrimination that is covered by the Act and they likewise agree that this feature of the Act, of the necessity of producing monopoly or affecting competition or of creating defi-
nite injury to a customer or a competitor will be the impor-
6900 tant point on which the administration of the Act will
depend."

I am not sure that the development of the Act has borne out Mr. Haskell or Mr. Abrams' prognosis; I even have difficulty with their basis for the conclusion they have here. It seems that differentials amounting to 6% and 3% are certainly substantial; and I believe that here we have the root of the confusion that was so apparent yesterday. Apparently in this instance consideration was being given by these gentlemen only to the tendency of their actions to create a monopoly at the buyer's level.

Mr. Gesell. It definitely says the opposite. It says, "For a competitor" and it says it in black and white in that paragraph that you just read.

Mr. Minicus. I had read that to mean a competitor of the customer. If it is a competitor of the du Pont Company, it is all right, but in that case we have to look then not at the number of packages of cigarettes or the number of loaves of bread that were packed, but at this 3 or 6 percent differential. That is the important thing here.

I will skip the next paragraph, if I may.

The following paragraph reads:

"Messrs. Haskell and Abrams very definitely told me they could find no fault with our present procedure and suggested that inas-
much as the two actions that have been brought by the Fed-
6901 eral Trade Commission under this law will be up for pre-
liminary hearing November 6th; after the completion of
these hearings, they would have something a little more tangible on which to determine policy in this direction.

"I showed them detailed sheets showing our analysis of the cost of various quantities to us, and the actual cost of handling this type of production in the plants and in connection with the solicitation of trade and they found them interesting as an exhibit of facts of this Division and asked to have copies of them."

There we have the fact that Mr. Hatt has shown these members of the Legal Department his cost sheets on this basis. Continue reading:

"This also brings the net on P. T. material down to $.0725 per pound and on M. T. to $.1123 per pound and this is using the to-date cost figures to the end of September."

I will skip this next paragraph, if there is no objection.

(Reading.) "If we take these same figures and change the price of glycerin to the price for the first quarter of next year, and we are told that the price for the latter months of next year will be even higher, that raises the glycerin cost on a basis of September figures to $.0310 per pound or an increase of $.0107 per pound for the September figures. This is an increase in cost of practically 15% of our P. T. net, and practically 10% of our M. T. net, and will represent on the forecast just made, a difference of $642,000 which deducted from the present net, would substantially reduce the earnings below the 20% level."

6906 Now, a long time ago we had a discussion about this 20% level, and here we now find it in the middle of a consideration of this discount problem. So apparently it affects that, too.

I will skip the next paragraph.

(Reading.) "This is intended to raise the question, therefore, regarding these calculations in connection with prices for 1937 and in connection with this, the consideration of whether we shall attempt to reduce the size of our quantity discounts at the same time. It would seem more desirable to make out whatever——"

Mr. GESELL. It says "most desirable."

Mr. MINICUS. That was a very important mistake. I am glad you caught that, Mr. Gesell.

(Reading.) "It would seem most desirable to make whatever change is to be made in quantity discounts, at the time we make a price decline so as to prevent an actual advance in cost to important trade.

"There is one way in which part of this might be attained and that would be by the establishment of a carload list price at something below the 500 pound base price which we have been accustomed to use. This would presumably be something approximating $.01 per pound but the objection to a carload price is we may find it possible to sell carloads advantageously only to the largest

6907 trade and we might build up a price barrier for ourselves with certain of the important and medium sized trade who buy large quantities but who buy it for shipment to several points and who would not be able to avail themselves of carload lots to any one destination.

"The real benefit to use of the quantity discount schedule which we have employed has been the maintenance of the continuity of purchases by individual customers. This has minimized the amount of solicitation required on many of these accounts and avoided the necessity of our having a salesman see them as frequently as they buy, without fearing the inroads of competition. Were we to eliminate the quantity discount entirely, we should have to have a substantially larger force to solicit the great number of accounts we now cover, at substantially increased sales expense. Many of our accounts are of the bakery type whose investment in business is small and whose turnover in baked goods is fairly large."

6908 That was the first intimation of the competitive effect of these quantity discounts.

"There is a definite credit responsibility here and we do not care to sell them excessive quantities except on a week to week and month to month basis and our sales agreement keeps these orders to us constant.

"I am attaching hereto a set of the sheets we finally worked up showing the cost of handling volume in various quantities, with a division of cost in solicitation and handling outside the plants and the detail of the actual physical handling of the orders as received inside the plants. To this I am appending also an analysis showing the proportion of cost of certain of these functions shown in the calculation and also following it with notes discussing the figures in detail and setting forth the kind of reduced discount schedule on which we have been calculating.

"In view of the Legal Department's recommendation to us, this is submitted as a matter of interesting, detailed information and I am assuming we will withhold any definite action on this until the Legal Department advises us further, or until we approach more nearly the end of the year—at or about which

6909 time we are accustomed to set our prices for the ensuing year. After you have had an opportunity to consider this in some detail, I should be glad to discuss it further with you."

Now, following that is a memorandum and explanation of the defendant's cost savings in quantities discount and an explanation of how this entire situation works. I will read the first two paragraphs:

"We base our prices on 500 pound quantity in rolls for shipment at one time."

That is the 500 pound level I spoke of before.

"This has been the smallest quantity on which the minimum price would apply in the past, subject only to quantity discounts based on the year's total purchases in dollars in varying amounts."

That is the operation of the dual discount system, the 500 pound level with the cumulative discount on top of it.

The Government very definitely relies on the next two pages of this document. We believe that it very clearly shows the workings of this discount system, but we will not read it into the record.

6910 Turning to Page 6306, at the top of the page:

"In addition to this, we would be justified wholly in giving a purchaser of $10,000 or more in a 12 months' period an additional discount of 2½%."

Now follows a series of brackets showing Mr. Hatt's cost analysis of cost savings at these various brackets. Thus, at $50,000 he estimates a justifiable discount of 2¾%, and that is the discount for that bracket.

Likewise, at the $100,000 bracket his estimate and the actual discount are the same.

At $150,000 they are the same. At $200,000 they are the same.

However, the spread begins at the $300,000 bracket. Whereas Mr. Hatt finds 3¾% justifiable, the actual discount at that place is 4%, and so it goes. At $400,000 4% is justifiable. The spread has gone up a half percent to 4½%. That continues. The spread gets larger. At $800,000 Mr. Hatt finds 5% justifiable, and the discount there is 6½%.

"The continuing volume beyond this point does not, with any additional reasonable quantity, offer sufficiently added savings per pound to justify further discount."

6911 Mr. Hatt says once we get to that 5% bracket we can't find sufficient justification to go beyond it. Yet I point out to the Court that this discount schedule went all the way up to 10%.

I will not read the rest of this document, but I point out that the Government relies on all parts of it.

The Government introduces into evidence Government Exhibit 5521 at Page 6310. This is a letter from Mr. B. M. May to Mr. L. A. Yerkes, dated November 2, 1936, and refers to the document just read.

"In connection with Mr. Hatt's letter of October 27 discussing price policy, there seems no reason in law why we should change our quantity discount schedule; therefore, the discussion may be confined to whether we wish to make a price reduction."

Now, that was Mr. May's conclusion at that time. Mr. Hatt pointed out that the discounts were not justifiable in a cost basis, and Mr. May found no reason at all why they should be changed at that time.

Mr. GESELL. That is a gross misrepresentation of the document, because it says in several places that Mr. Haskell and his associate counsel advised that the existing discount situation was solid.

6912 (The following is to be inserted after line 11 of the preceding page 3903):

(The letter from Mr. B. M. May to Mr. L. A. Yerkes dated November 2, 1936, was received in evidence and marked "Government's Exhibit 5521.")

6913 and consistent with the law, and, of course, Mr. May could read—unlike Mr. Minicus.

Mr. MINICUS. That is quite so, I am sure, and Mr. Hatt, of course, repeatedly pointed out to the Legal Department that these discounts were not justifiable on the cost that he had worked up to the company.

The COURT. Well, if you were in Mr. May's position would you have taken Mr. Hatt's view or the lawyer's view?

Mr. MINICUS. I think I would have found out definitely and not perpetuated an illegal situation.

The Government offers in evidence Government Exhibit 5516, which is a letter from Mr. SLA—I believe that is Mr. Abrams—to Mr. C. F. Brown, the Cellophane Division.

"It has been my impression"——

Mr. GESELL. Let us have the date.

Mr. MINICUS. Certainly. I omitted that. March 3, 1938. This is approximately a year and a half after the correspondence just read.

(Letter from SLA to Mr. C. F. Brown, Cellophane Division, dated March 3, 1938, was received in evidence and marked "Government Exhibit 5516.")

6914 Mr. MINICUS. "It has been my impression that cumulative quantity discounts on purchases of "Cellophane" have been allowed only to consumers. In revising your sales contract forms, however, I notice that such discounts are also allowed to converters and resellers. I doubt whether consideration has been given to whether such discounts are proper under the Robinson-Patman Act in the case of the latter types of customers.

"Such discounts are invalid under the Act unless it can be shown either (a) that their effect does not injure competition, or (b) that they represent only due allowance for differences in cost which result from the differing methods or quantities in which the commodities are sold."

Now, we have Mr. Abrams' exemptions from the Act (a) and (b), and we are now working on (b). We will come to (a) after this point is concluded.

"It has been our feeling that these discounts will cause no injury to competition between customers who use "Cellophane" in packaging their own products."

Now, there the statement is quite clear. What Mr. Abrams is looking at is the tendency to injure competition at the
6915 secondary level, because it is no injury to competition between customers.

"In such cases the discount would represent an infinitesimal part of the customer's cost of doing business, and hence could have no perceptible effect upon competition between such customers. This reasoning does not apply, however, in the case of customers who fabricate or resell the "Cellophane", since the price which they pay for this material constitutes a major element of their costs. In these cases, therefore, the discounts must be justified on the basis of differences in the cost to us of supplying the different quantities."

I submit that there again we have this persistent confusion that all that is being considered is the competition between the customers and not between the sellers, and that is where Mr. Abrams found his justification for a continuation of the quantity discount system on direct sales. He was completely ignoring or overlooking the element of competition between the sellers of these products.

"The question of cumulative discounts has been considered recently by the Federal Trade Commission in the case of H. C. Brill Company, Inc. The Commission's opinion is that case sets the following broad principle:

6916 " 'A cumulative discount is sound only where savings have been achieved by the seller with respect to individual sales made to a particular buyer over a period of time, which savings were not reflected in the price at which the buyer purchased and which are reserved for the purpose of refunding at the end of a period of time. But any system of discounts based on the amount of annual sales is a price discrimination contrary to Section 2 (a) of the Clayton Act, as amended, if it has any of the injurious effects on competition enumerated in the statute, unless justified as by making only due allowance for differences in cost not previously allowed and resulting from the quantities sold or delivered.'

"The cease and desist order issued by the Commission in that case prohibited the respondent from 'granting or paying, or agreeing to grant or pay, sums amounting to discriminations in price in the form of cumulative discounts, except where such discount makes only due allowance for differences in cost which have been achieved with respect to individual sales made to a particular buyer over a period of time, which differences in cost were not reflected in the price at which the buyer purchased.' "

6917 It is quite obvious from that paragraph that Mr. Abrams thought there was a great deal of doubt about the legality of any cumulative quantity discount, and there isn't one of them that has ever been upheld by the courts to date, and he certainly thought that if it had any chance, you would have to depend upon the cost justification theory.

"In the ordinary case it is practically impossible to establish savings in cost which are due to quantities taken by a customer over a year and which are not dependent upon the size of each order or shipment. It is suggested that consideration be given to whether or not it would be possible on the basis of a cost analysis to demonstrate that the cumulative discounts which you allow to converters and resellers represent only the differences in your costs of supplying the specified quantities on which such discounts are allowed."

Now, it was at about that time that we had the discontinuance of the cumulative quantity discount with regard to the converters and to the other purchasers for reselling. However, the cumulative quantity discount continued over with regard to direct
6918 sales. The only indication that I have been able to find in
the evidence or anywhere else for the reason for that distinction between direct and indirect sales has been in this confusion that seemed to exist with regard to whether or not there was any injury to the purchaser, whether there was a restraint of trade, in other words, at the secondary level. It is quite clear that that is all that that document referred to.

Mr. Gesell. Well, now, that isn't correct, because he said point (a) and this came under point (a), and we have been creating a false issue by talking always about point (b).

Mr. Minicus. We are going to talk about point (a) pretty soon, Mr. Gesell, if you will just be patient, but as long as Mr. Abrams found that there were two elements that guided the legality of this matters, I would appreciate an opportunity to discuss both of them, if Your Honor pleases. We are not going to skip anything. We will consider the tendency to injury the competition, too.

The Government offers in evidence Government Exhibit 5020 at Page 4455. This is correspondence with Mr. J. E. Hatt to Messrs. L. A. Yerkes and B. M. May, dated May 24, 1943.

Mr. Gesell. It is already in evidence.

6919 Mr. Minicus. This document is in evidence. We will just refer to it at this time.

"We have been accustomed to offer sales agreements to important trade covering their annual purchases from us, which agreements provided for a quantity discount for annual purchases, in excess of $10,000 and up to $50,000 of 2¼% cash rebate. This schedule has been continued with brackets of $50,000 additional purchases, at the rate of ¼% additional discount for each bracket to a maximum total of 10% discount on purchases in excess of $1,500,000.

"When this present schedule was set on that level several years ago, the Legal Department took the position that while this might be subject to some question, that due to the fact that it covered only wrapping material which is a small part of the total cost of the article wrapped, it could not be said to violate the principle of the Robinson-Patman Act, because the amount of difference between the varied discounts of different size producers of the same material was not sufficient to impede competition."

So here in 1943 the du Pont Legal Department has finally come around to the point of view that there is something very wrong with this discount system, too. There is no question about it now, I don't think.

6920 Mr. GESELL. Well, now, is that fair? Look at the last sentence of the exhibit on that page.

Mr. MINICUS. I am going to read the whole exhibit.

Mr. GESELL. It isn't fair to represent that there is no question.

Mr. MINICUS. I think it is.

"In discussing the required procedure on our part to make our position sound, they say that a substantial reduction in the size of the percentage discount would be very definitely a step in the right direction."

Now, that is the same decision that was reached years ago, that they should do it then. That was Mr. Hatt's recommendation, anyway.

Mr. GESELL. No, it was not. He didn't so recommend.

Mr. MINICUS. The Court will recall Mr. Hatt's recommendation that the discount schedule stop at 5%, I am sure.

"To attempt to abolish the quantity discount altogether with one price adjustment would involve a cut in excess of 4 cents per pound on our list price for standard material. This seems undesirable at the moment. The Legal Department are not
6921 urging us to clear it up entirely unless later decisions should be more determining in this direction."

6922 Now, I think that that does not justify the position at all. I think that just shows further procrastination six years after they had decided there was something wrong in the first place.

(Reading.) "To eliminate quantity discounts all at one time would necessitate a much greater number of detailed sales calls on a large number of agreement accounts to insure the maintenance of a considerable portion of this business, and in our present personnel position this would be difficult to do.

"With the return of quite a number of our former personnel, who are now either transferred to other divisions of the Company in the Armed Forces, this could probably be done to better ad- ntage later.

"The present thought is to initiate a program, to be effective im- ediately at the beginning of postwar work, to put this in such ape as to discounts involved so that if it later became necessary wipe out quantity discounts altogether that it could be done with mall adjustment in the schedule of prices.

"During the past 12 months we have had a total of 287 agree- ent accounts outstanding on which quantity discounts have been id."

Mr. Gesell. Y[illegible] read this once into the record.

Mr. Minicus. This is the section I have read. This is the 23 one paragraph that I have read in the case and I will ask the Court's indulgence to read it again: "Of these, four accounts ve represented the total number of the concerns receiving a bate in excess of 7½% up to a total of 10%. All of these four counts are cigarette accounts. Also of a total of the 15 largest counts, there are two more cigarette companies of large size tting quantity discounts of the nature of 4½%. These six ciga- tte accounts provide over $6,000,0000 worth of annual purchases om us which represents a third of our total volume of agreement counts in dollars."

Six accounts represent one-third in volume of their total agree- ent accounts.

"One solution to a part of this problem would be to make a spe- al film for the cigarette trade only and to sell it to the cigarette mpanies at a net price per pound subject to no discount and this ice does not in any way need to affect or influence the price we ay make on standard goods for any other class of trade or for y run-of-mill sale of cellophane to miscellaneous industries."

Mr. Gesell. You don't claim that was done, do you?

Mr. Minicus. I do not claim that was done. I have read that ragraph, your Honor—as long as Mr. Gesell has pointed it up— have read that paragraph to show that here again is this pri- ary concern with these large accounts, this important trade, the trade that we say was monopolized by this system.

24 (Reading.) "This is entirely in accord with the principle of the law and also it may fit into our production and quality ogram to excellent advantage. What we have in cigarette film day, which has been modified as far as softener is concerned over rmer deliveries, is very largely satisfactory with the possible ception of an expressed desire on the part of the cigarette com- nies occasionally for greater protection."

I will skip the next paragraph. On page 3 of the exhibit or ge 4457, under "Proposed Quantity Discount Schedule" there is ted "Annual Purchases" and then the discount schedule follows, and then the statement which I will read: "We may find it difficult to claim any substantial saving beyond this amount although on selling costs alone, substantially larger volume than this might justify an additional ½% or in extreme cases an additional 1%."

Now, the amount as shown by the table above, which they found it difficult to claim any substantial saving, is 3½%, and we still know that at this time the schedule han all the way up to 10%. So at least under the Government's interpretation of this document, we have here now in 1943 an unequivocal declaration that du Pont's cumulative discounts on direct sales could not be justified by cost savings and that a change would be, to say the least, a step in the right direction.

Finally, on January 9, 1945, two years later—

The Court. How many more exhibits do you have?

Mr. Minicus. On this point?

6925 The Court. On any point.

Mr. Minicus. On all points?

The Court. You will not finish tonight?

Mr. Minicus. No.

The Court. Then we will adjourn for today. However, I want to utilize a portion of tomorrow for this conference that I was speaking about. May I make this suggestion in connection with that conference. I suggest that each counsel bring with them an agenda of some sort and we will take up each item. After discussion we will come to some conclusion as to how we are going to dispose of it, and then we will dictate to the Reporter the way the matter will be disposed of.

This is what I have in mind, for example, on the agenda. On May 3 Mr. Gesell made a motion to dismiss as to caps and bands on the grounds of certain concessions or at least certain types of evidence that the Government put in. Now we will have to consider, should that be augmented by a written motion? Do you want it passed on at this time? Or will you give consideration to postponing the decision on that motion until after your case opens? You do not have to give me an answer on that point now. I simply want you to think about it.

Another thing is, we will have the question come up on post-complaint evidence. Under that, will it be necessary under Rule 15 (d) to amend your answer in order to recite events which occurred subsequent to the filing of the main pleading?
6926 That is the thing we will have to discuss.

Another question will be how we shall rule on any offer you might make of substitute material defense. So in general, if you have those things in mind, that is what I would like to devote tomorrow to.

I might have some detailed questions, Mr. Gesell, as to whether you are going to utilize an index of exhibits, and if you are, whether you are going to follow the blueprint pattern of the Government's index or whether you are going to have one of your own, whether or not you are going to have a trial brief for the Court, and such sundry matters. I think all of those things should be determined before we take any further recess.

So we will hold open Tuesday of next week and Thursday of next week for the matters which we will discuss tomorrow.

Mr. Gesell. That would give us an opportunity to argue such of those matters that have to be argued before the adjournment for the summer?

The Court. Yes. And if you are not ready by next Thursday we can fix some date in June.

Mr. Gesell. We will be ready. We are quite anxious to argue the post-complaint and competition with other materials before any summer adjournment, your Honor.

The Court. Very well. I will be willing to fix a date on that. I hope it to be next Thursday.

6927 Mr. Minicus. I would like to say this off the record.

(There was a discussion off the record.)

The Court. We will adjourn until tomorrow morning at 10:30.

(At this point the trial was adjourned to Friday, May 25, 1951, at 10:30 o'clock, A. M., Eastern Daylight Saving Time.)

* * * * *

6930 Friday, May 25, 1951, 10:30 O'clock A. M.

Present: As before noted.

Mr. Minicus. At the close of the session yesterday we were bringing to a conclusion the plaintiff's point addressed to the non-justification on the basis of cost savings of these quantity discounts.

The Government now offers in evidence Government Exhibit 5393 at page 5213.

(Letter from R. E. T. Haff to Julian Ritchie dated January 9, 1945, was received in evidence and marked "Government's Exhibit No. 5393.")

Mr. Minicus. This is a letter from Mr. R. E. T. Haff to Mr. Julian Ritchie dated January 9, 1945. The subject is "Distributor Agreement for Export Trade."

It reads:

"Recently I discussed with C. F. Brown the subject matter of your memorandum to me of November 3. Mr. Brown tells me that Cellophane will undoubtedly change its special quantity discount agreement after the war because, unlike our own, it is vulnerable under the Robinson-Patman Act. When he changes his discount agreement for his domestic trade, he will do so for his export trade at which time it will probably be necessary 6931 to make some modification of his agents' set-up because, as I understand it, in some cases the agents receive the quantity discount and others the discount is paid to customers. In the case of 'Cel-O-Seal', however, we have no intention of changing our discount agreement except perhaps in minor detail of arrangement of the document itself.

"Our surtax method of calculating the rebates is satisfactory to the Legal Department and is one which Cellophane will copy in principle. For that reason, when Cellophane changes we will probably not change; hence, if a change in distributor agreement is indicated, there is no reason why it cannot be made now if we want to make it now."

I submit that here again in this document in 1945 is another admission by the du Pont Company that the cumulative quantity discounts are vulnerable under the Robinson-Patman Act as least as regards cellophane.

The evidence on this question of discounts to direct users thus far has established that the defendant has operated under a dual discount system, that is, the list price discounts applicable on unit sales and the volume or cumulative discounts which assume the form of a rebate determined by the amount of a particular customer's purchases during a year.

The Government contends and the documents in the du Pont Company admit that the discount schedule, based upon purchases made during a specified time and having various brackets 6932 of requirements and discounts related thereto, is virtually impossible of justification on a cost savings basis.

Now, in addition, these schedules as they were followed by the du Pont Company, are subject to other objections.

First, in deriving the value of a customer's annual purchases all sales to subsidiaries were included. This applied whether or not these sales required individual solicitation, separate handling and preparation for shipment to different points. In other words, the orders of large customers having several subsidiaries could very conceivably be more costly than a single purchase by a small purchaser.

Secondly, du Pont agreed, with one wholesaler at least, who sold on his own account to lump all purchases by particular customers regardless of whether made through that wholesaler or through du Pont, and this lumping was accomplished for the purpose of paying the cumulative discount in the form of a rebate. These practices are further established by the following exhibits: and the Government offers into evidence Government Exhibit 5386, Government Exhibit 5276 and Government Exhibit 5524.

(Letter from E. B. Ichla to Brooks Paper Company dated August 26, 1942, was received in evidence and marked Government's Exhibit No. 5386.")

(Letter from E. C. Lake to H. D. Catty dated October 8, 1945, was received in evidence and marked "Government's Exhibit No. 5276.")

6933 (Memorandum from W. J. Harte to J. W. Johnson dated May 9, 1946, was received in evidence and marked "Government's Exhibit No. 5524.")

Mr. Minicus. Now, likewise, we intend to establish that in the field of caps and bands the price differentials charged for caps and bands were also admittedly not justified by cost savings.

The Government refers to Government exhibit 250 and Government exhibit 252, previously introduced into evidence. These are two of the "Cel-O-Seal" bands price lists which have been selected at random for the purposes of illustrating that in the field of caps and bands there also was operative the price list discount as well as the surtax cumulative discount which we previously discussed. It will be noted on these exhibits and the other price lists relating to caps and bands which are in evidence that on unit purchases a very markedly different price was charged to a purchaser, depending upon the bracket within which his purchase fell. Thus, in the first bracket the purchasers from 10,000 to 24,000 units on a typical type, or one chosen at random, was $1.43. Now, for the same type in the brackets from 25,000 to 99,000 that price is $1.13, and for 100,000 or more the price fell to .62.

Now, with regard to this, and bearing in mind that operative at the same time was this surtax system, the 6934 Government offers in evidence Government's Exhibit 5389 at page 5207. This is a letter from Mr. Haff to Mr. Ritchie, dated March 17, 1944, under the heading "Prices."

(The letter from R. E. T. Haff to Mr. Julian Ritchie dated March 17, 1944, was received in evidence and marked "Government's Exhibit 5389.")

Mr. Minicus. (Reading.) "I realize that it is a common practice in the closure industry to allow customers to combine orders for different sizes of caps, etc. to obtain the lowest possible price. This is doubtless another one of those old Spanish customs with which business men saddle themselves and never get rid of.

"If there is a legitimate reason for having a substantial price differential for quantity, then what is gained by permitting combinations which eliminate the differential? All we do is make more work for ourselves and we don't get anything for it. What I have had in mind for sometime is that we should rationalize our price structure eliminating the water which we now have in the differential between the different quantity brackets and making those

differentials representative only of the actual difference in cost of production. With the price for the low quantity brackets inflated to the extent that it is now, there is a natural reluctance on the part of the customer to pay that price when he sees the quantity price staring him in the face. So he turns on the heat and de-
6935 mands the quantity price on everything and knowing that our prices are inflated, we say O. K.

"If I have made no mistake in copying them, the following represent the prices we now charge for a 33 x 45 plain 'Cel-O-Seal' band. The column headed 'A' represents what those prices might be expected to be if we make a price reduction of about 10%."

And then follows a short tabulation in three columns showing the present price Plan A and Plan B. Then the base price under these three is set forth. The base price at present 2.07, under Plan A 1.86 and under Plan B 1.80. Now, for 25,000 to 99,000 bands that price at present rises to 2.60 and under Plan A. to 2.34 and under Plan B to 1.85; and then for 10,000 to 24,000 the present price is 3.05, Plan A is 2.74, and Plan B is 1.90.

So we see from this table, then, that on what they call the base price, which is over 100,000 units, it is 2.07; then the next bracket is from 25 to 99, 2.60; and for 10,000 to 24,000 it rises to 3.05.

"If we had the prices in 'A' then we would be again forced to combine quantities and colors and types and what have you and go through all the bookkeeping in order to get the base price of $1.86, but I am convinced that it doesn't cost us, for example, 40¢ a thousand or anywhere near it to manufacture a 15,000 lot instead of a 50,000 lot.

6936 "Suppose then our price reduction took the form shown in column B, and at the time these prices were announced we notified the trade that we would no longer permit combinations of quantities. Do you think we would get away with it or would our customers still continue to demand the minimum quantity price in all quantity brackets?"

6937 The Government offers in evidence Government Exhibit 5390 at page 5209. This is a letter from Mr. Ritchie to Mr. Haff dated March 20, 1944, and is a response to the letter just read.

(Letter from Julian Ritchie to R. E. T. Haff dated March 20, 1944, was received in evidence and marked "Government's Exhibit No. 5390.")

The COURT. Now, Haff is indelibly fixed in my mind but Ritchie is not.

Mr. MINICUS. Mr. Ritchie was the Sales Manager for the Cel-O-Seal Section, that is, the caps and bands section.

(Reading.) "There is no doubt but what you are absolutely correct, theoretically, on your recommendation that we establish a price set-up so each customer will pay for the actual quantity of each special size or type of material that he orders for shipment at one time. If you wish to establish such a price set-up, you can be sure that we here will do all we possibly can to make it work.

"I am frank to tell you, however, that such a plan will meet with the strongest opposition from our largest customers * * *" That is the point the Government has been making right along; it is always this important trade, the largest customers that are considered. Continue reading: "* * * and yet, at the same time, this large trade orders, normally, at least 100,000 units of each
6983 style and type at one time. Since 29 accounts are responsible for about 66% of our total band business, a change in our present policy will actually affect our return on approximately 34% of our business. To attempt, therefore, to make a rather major reduction in our price, I am afraid would result in simply reducing our net materially.

"Since it is standard practice in the closure industry to allow customers to combine their orders for the quantity price, our attempt to make a change would be just like a 'voice crying in the wilderness'. In almost every instance, it is axiomatic that it is cheaper in the long run to follow standard policies that have been adopted over a period of years than attempt to pioneer in new methods. I am very much afraid you will find that if you try to establish a new method of pricing closures, the net result will be the new lower prices established for the old method of doing business. In other words, the new scale would still permit a combination because of the extreme pressure placed by consumers of these closures.

"Until something unusual occurs, therefore, it is my feeling we should continue to set our selling prices high enough to allow these combinations and yet, at the same time, give us a satisfactory return on our investment."

The Court. Now, when he refers to pressure, how do you interpret that? Does that mean that if du Pont did not follow the program as there suggested the business would go
6939 some other place? Does that or does that not, and this is my point, connote existing competition?

Mr. Minicus. I don't think that is the kind of pressure, as I read the article, that they mean, but as they expressed in the previous document, your Honor. This is pressure on the du Pont Company at all times from their own customers, which is considerable pressure, to permit these combinations of different types and colors and sorts of caps and bands.

Mr. Gesell. Your Honor, there is a hand-written footnote on this document which has not been read to the Court which supports the proposition that it was the competitive pressures that were concerning du Pont.

Mr. Minicus. I had not finished reading, your Honor. I am very happy to read this footnote. Unfortunately two words are illegible.

Mr. Gesell. None are on my copy so perhaps I had better read it:

"P. S. On this copy only. If Celon and Sylvania don't follow our lead about this only net result would be a cut in price," which shows that the problem that du Pont was considering would be whether if it made this change it would be able to hold the business against the equal discounts of the others, and the only net result then if they made the change would be they would have to 6940 cut the price in order to stay competitive.

The Court. I yet did not get your interpretation of what "pressure" meant. I have got Mr. Gesell's interpretation of the writing. What is yours?

Mr. Minicus. My interpretation of the pressure is very clearly brought out in the preceding document, that this was pressure of customers, of buyers upon one particular seller, the bargaining prices, trying to convince them that they should continue and always continue to be able to get these combinations at a reduced price.

I wanted to read that footnote myself, your Honor.

The Court. You had better borrow Mr. Gesell's copy.

Mr. Minicus. It is now in the record, but I do want the point made that that is the question of Celon and Sylvania following that du Pont price.

Mr. Gesell. Not at all. It shows they are not at all sure they are going to follow it. To get into that, it completely refutes the notion of combination conspiracy as to price.

Mr. Minicus. Now, I would like to direct our attention along to the second point that I said we were going to discuss under this heading, and that is the marked tendencies of the defendant's discount system toward maintenance of its monopoly power. It is necessary not only to emphasize the suppressive effects 6941 exerted upon the other manufacturer's sellers by this discount system but also the deterring effect such a system must have upon anyone considering entry into the industry. So in viewing the anti-competitive effects of these discount systems, I think it is necessary at all times to bear in mind that the Government is urging a double effect, a suppressive effect upon the existing producers and a deterring or exclusionary effect upon anyone outside the industry who might at any time consider entry into the industry.

It seems quite clear, Mr. Gesell's earlier comments to the contrary notwithstanding, that there are four prerequisites of the Robinson-Patman Act violation as established by the statutory language and by judicial interpretation of that language: one, a price differential on sales; two, of goods of like grade and quality; three, to more than one purchaser; and four, in interestate commerce.

I submit that under the cases, having shown that, the plaintiff has shown enough to establish a price discrimination. We most definitely have shown not only one price differential operating on these sales in both cases of cellophane and caps and bands, but a dual price differential. There has been no contest of the fact that these are goods of like grade and quality. Obviously they have been sold to more than one purchaser and sold in interestate commerce. We feel by virtue of those facts that we have established our price discrimination. However, there are possible
6942 justifications and defenses to a bare price discrimination of the type that I have just detailed. There is the factor of cost justification, the evidence bearing on which we have just considered and which I am happy to be able to state Mr. Gesell conceded, that there is no cost justification for these quantity discounts.

Mr. Gesell. Of course that is not what I said, but it doesn't really make any difference at this late stage of this discussion.

Mr. Minicus. It was quite clearly my understanding that you did not see why we should put in the documents because you conceded the point.

Mr. Gesell. I said there was no cost justification being offered in respect of these discounts, not that there wasn't one. You don't need one. He hasn't shown the discrimination.

Mr. Minicus. I submit, your Honor, that the record shows that Mr. Gesell cannot even challenge this factor of cost justification. The evidence is overwhelming and clear and unambiguous, and admitted by the defendant itself.

The second factor as a defense for discrimination, the bare discrimination outlined above, is found in Section 2 (b) of the Act, and that is the defense of meeting a lower price in good faith to meet competition of the competitor. Any claim here it
6943 would seem to me would be entirely contrary to the evidence and even ridiculous in the face of the market situation. It was seen through testimony of witnesses, from the evidence, who set the price in the industry and how it was set. Du Pont didn't meet anybody's price at any time.

The third factor is that of the non-competitive effect of the price differential, and that is the subject we are going to consider at this stage.

Now, this question of the competitive effect of a price discrimination has been much bruited and finally decided, and here again we have a clear and unequivocal pronouncement by the highest courts in the land that the burden of showing that this price discrimination had no competitive effects on the defendant. This is not a plaintiff's problem.

That is incontestibly established by the Moss case, 148 Fed. 2d at page 379. This case, I might state, your Honor, was cited with approval by the Supreme Court in the Morton Salt case. I would like to read a very short portion of the opinion.

The Court. Who is writing?

Mr. Minicus. Second Circuit, your Honor, per curiam opinion.

The Court stated there that the Commission's argument had been that once it approved sales at different prices, this—"put upon the petitioner (Moss) the burden of justifying the

6944 discrimination; and warranted the order, if it failed to do so. The petitioner (Moss did not prove affirmatively that the discrimination did not lessen competition or tend to prevent it * * * It is true that Section 2 (a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engaged in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere. But that is often hard to prove; the accuser must show that there were competitors whom the higher of the two prices would, or might, not have defeated, but who could not meet the lower. Hence Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result. If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business; he will succeed, for the accuser will not then have brought him within the statute at all. Nevertheless he may succeed even though he fails to establish such a negative; for, although it will then appear that he has lessened, or prevented, competition, the proviso of Section 2 (b) will still excuse him, if he can show that his lower price did not undercut his competitors, but merely 'met' their 'equally low price.' In short, that is a defence to the violation of Section 2 (a). This is as we

6945 interpret Section 2 (a) and Section 2 (b), when read together."

Now, that opinion is well-accepted law today, and it has to some extent caused the Federal Trade Commission to radically change its procedures in proving price discrimination.

The Court. How did they operate? Simply issue a stop order and then shift the burden to the respondent?

Mr. Minicus. Well, in their formal hearing they have an administrative hearing and they simply prove the points that I pointed out again, the price difference of goods of like grade and quality, more than one purchase, and inter-state commerce.

Mr. GESELL. No, your Honor, not at all. The last case that has come in on that is the Morton Salt case, where they took something like 1,300 to 2,800 pages of testimony on competitive effect.

Mr. MINICUS. I was coming to that, your Honor. If Mr. Gesell will let us finish, instead of the middle of my sentence interrupting the beginning of his, if I could only finish one, I think I could finish a point. I was about to say, your Honor, that the Federal Trade Commission has not always followed that procedure that I just read. I say that is all that they have to under the law, and sometimes they do just do that, but because of Section 2 (b) and the way Section 2 (b) has been interpreted, the Federal Trade Commission will often proceed to show the anti-competitive effect of the discount.

6946 The COURT. Well, if they would do that, why wouldn't the Department of Justice do it?

Mr. MINICUS. Because they have a formal reason under the Act, your Honor. Section 2 (b), which provides justification through the good faith meeting of the lower price of a competitor, has been construed to be—let me get this straight—that there is a presumption on the proof of the four elements here that there is a discrimination, unlawful discrimination. Now, Section 2 (b) has been construed to mean that if the respondent——

The COURT. Excuse me. Now I am interrupting you. I am sorry.

Mr. MINICUS. That is all right, sir. That I appreciate.

The COURT. When you say an unlawful discrimination, do you mean simply on the basis of the mathematical figures and then they stop there?

Mr. MINICUS. The price differential plus a showing of goods of like grade and one quality to more than one purchaser in interstate commerce.

Now, if they stop there, they have a presumption working for them, but it has been construed that the respondent, if he can show a lowering of price in good faith to meet the lower price of a competitor, has rebutted that presumption, and then the commission must go on from there.

6947 The COURT. Go forward.

Mr. MINICUS. But the construction has also worked that if the Commission seizes the bull by the horns and itself shows the anti-competitive effect on its case in chief, it is impossible for the respondent to avail itself of that defense under 2 (b) because the presumption is no longer rebutted. That is why the Commission has done it, particularly in the case that Mr. Gesell mentioned.

The COURT. I don't quite understand that. You mean that under the administrative process a person whose activities are under challenge must sit by silently and not be in a position to answer evidence adduced by the Government in support of the Government's position?

Mr. MINICUS. Until the ruling in the——

The COURT. It is certainly alien to the Anglo-American concept of fair hearing.

Mr. GESELL. That is why the Supreme Court put it straight just recently in Standard Oil of Indiana.

Mr. MINICUS. I am about to bring it out, Mr. Gesell. I think I am addressing the Court in answer to his question.

Mr. GESELL. So am I.

Mr. MINICUS. I don't think it was a question addressed to you. I understand that in the Standard Oil of Indiana case just this
year, by the Supreme Court a few months ago, it was
6948 ruled finally that this Section 2 (b) was a substantive de-
fense, but up until that time there had been a great deal of doubt, but the weight of authority leaned toward the fact that 2 (b), because the other part of the Section was procedural, merely was a procedural device. In other words, it was not a substantive device, and when the Legislature had spoken of this meeting in good faith of the lower price of a competitor, it was only speaking of a procedural device and not a substantive device.

Now, that has all been overruled by the Supreme Court this year when they decided, if you show the meeting of a competitor's price in good faith, you have a good defense to the thing, but we were only concerned for the moment with why the Federal Trade Commission, in the Morton Salt case that Mr. Gesell spoke about, took this long hearing on the anti-competitive effect of the price discrimination, because this Section 2 (b) was still viewed as a procedural matter only, and the Commission was availing itself of the advantage acquired by putting the presumption beyond rebuttal through showing itself the anti-competitive effect of the discrimination.

Now, as far as the hearing is concerned, you see, this business of a quantity discount was not a natural right, your Honor; it was something that had been provided by the Legislature. Section
2 (a) virtually makes all of these price discriminations il-
6949 legal while they have an anti-competitive tendency.

Then they went on at 2 (b) and gave it another defense, the good faith meeting of the lower price of a competitor. Then the question was, was it procedural or substantive? What did the Legislature intend to grant by that? So there was no denial of the right of hearing. The question was whether this extra defense provided by Section 2 (b) was a procedural matter or whether it was really intended to be a substantive defense, and cases had held, particularly the Standard Oil case in the Seventh Circuit, that it was a procedural matter, and it wasn't until this year that the Supreme Court overruled the Seventh Circuit on that point. Today it is a defense of substance, but at the time this hearing was taken in the Morton Salt case it was thought to be a procedural matter, and that is the reason why the Commission heard the entire record on the anti-competitive effect of the——

The Court. Well, the Supreme Court sent the Standard case back to the lower court for reconsideration. What is going to take place in that case after the remand?

Mr. Minicus. I presume that they will follow the instructions of the Supreme Court, your Honor, and simply treat this as a substantive matter.

I am sure the gentleman behind me, from all the noise he is making, has the answer to your Honor's question.

The Court. I think I will stop asking questions for 6950 fifteen minutes, because every time I ask one it engenders a controversy. While it is very pleasant, I would like to finish today.

Mr. Minicus. I would too, your Honor, I assure you.

The Court. All right, you may proceed.

Mr. Minicus. Thank you, sir.

The court specifically said in the Morton Salt case that they didn't have to go that far. The Supreme Court said that that testimony didn't have to be taken.

6951 We contend, at any rate, whatever the effect is here, that there is nothing barring us, I am sure, from showing the anti-competitive tendencies of this discount system.

Now, the act sets up certain standards of competitive effect. One of these, the first of these, is a carry-over from the old Clayton Act, wherein it is stated in effect that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

The second standard is one that originated with passage of the Robinson-Patman Act, by virtue of the language of that Act, that is, where the effect may be to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with the customers of either of them.

We are only interested here in one line of commerce. I have pointed this out before. And both standards take care of that. The first standard says "in any line of commerce". The second one says "injure, destroy or prevent competition with any person who either grants—" and it is the grantor that we are interested in here.

Now, it has been definitely determined that the words "may be" in the Act indicate neither bare possibility nor certainty. Instead they indicate probability to be deduced from intent or character of the acts themselves—to be deduced from the intent or the
6952 very character, the inherent character of the acts themselves. The words "where the effect may be" are obviously used merely to indicate that it is tendency and probable effect rather than actual results that are important. That was specifically held in Federal Trade Commission against the Goodyear Tire & Rubber Company, 22 F. T. C. 232 at page 331 in 1936.

Now, the Morton Salt case in the Supreme Court has even gone beyond that and relaxed that liberal standard because in the Morton Salt case it is quite clear from the whole opinion that the standard is that of a reasonable possibility. If there is a reasonable possibility that this discount system will injure, destroy, or prevent competition with any person who grants the discount, then the discount is illegal.

The COURT. Well, the basic facts involving commerce involve so many inponderables I am not quite sure how you can use a formula which says that the word "effect" may have a "tendency," how that can take the place of the actual demonstration in fact that there has been a direct effect on commerce. Do you mean we apply a theoretical formula to test the legality of the questioned acts?

Mr. MINICUS. I would not say it is theoretical——

The COURT. Who determines that the effect may be a tendency?

Mr. MINICUS. The Court very definitely. If from all the
6953 economic facts of the case, the particular case involved——

The COURT. Well, that was the premise of my first question, that economic facts with relation to commerce involve so many imponderables.

Mr. MINICUS. That is quite true. And this may be a subjective standard but it is definitely the standard that has been adopted by the Courts. Justice Jackson in his dissenting opinion felt that it was not a good idea, but he makes quite clear that that is what the majority thought in that case. I think in the facts of this case, your Honor, we will be able to go beyond the mere possibility. Now, moving on from the words of the statute "may be," I would like to dwell for just a moment on the difference between the two standards contained in the Act that I had read previously.

It is quite noticeable that the addition supplied by the Robinson-Patman Act, that is, "may be to injure, destroy, or prevent competition, with any person who grants * * *" shifted the emphasis from an inquiry to competition in an industry as a whole to injury to individual competitors, and that is probably the logical basis for the rationale of the two standards. One looks to an industry-

wide injury or prevention of an individual. Because of the unique market structure of this industry, where there is only one competitor in cellophane and only two competitors in caps and
6954 bands, a competitive injury to an individual competitor is
virtually an industry-wide restraint. Therefore either of the standards set forth in the Act are applicable to the facts of this case. As I have stated before, it has been repeatedly stressed that upon the basis of incontestable authority proof of the Government's case need only be concerned with the competitive effect of the defendant's price differential at the seller's level. For this reason it is absolutely immaterial in this case whether or not the purchasers who bought at different prices were in competition with each other. If the buyers under this discount system were not in competition with each other, that would not make any difference. As a matter of fact, in many instances, as illustrated in the cigarette field, they were in competition with each other, but in other instances they were not. However, this can have no effect upon the legality of the discount when we are looking only to the tendency to injure or prevent competition at the seller's level. Naturally the Act says "any line of commerce"; if you are looking to the buyer's level and the injury to prevent competition there, it would be reasonable to expect these purchasers to be in competition.

Now, Mr. Gesell yesterday or the day before had placed great stress on this fact that many of these purchasers were not in competition. I submit to your Honor that not a single case will be found in the books dealing with the tendency of injury at
6955 the seller's level that required the buyers to be in competi-
tion. On the contrary, E. B. Muller & Company against the F. T. C., Sixth Circuit, 1944, 142 F. 2d 511, was a case involving a tendency to monopolize at the seller's level, and the Court stated:

"Petitioners contend that in spite of the conceded discrimination, their course of conduct was not forbidden by the statute. They urge that since Muller's standard grade of chicory was not of the same grade and quality as Schanzer's, there could be no discrimination against Schanzer. But the Commission did not find that there was a discrimination against Schanzer. It found that the discrimination between the petitioner's customers injured Schanzer and tended to establish a monopoly. The record clearly shows that this discrimination existed between competing customers, although the statute requires only that the discrimination be between different purchasers of like grade and quality. Since the discrimination prohibited is one the effect of which may be substantially to lessen competition or tend to create a monopoly or to prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, the statute clearly applies. The discrimination found to exist tended to create a monopoly."

Now, there I think it specifically says that when the injury or prevention of competition is at the seller's level, it is not
6956 necessary that the purchasers be in competition.

I would like at this time to consider certain factual elements which we insist are present here relating to the injury to competition in this case, that is, competition at the seller's level.

In viewing these matters again, it is necessary at all times to relate these factual propositions to the defendant's dominant position in the industry. Particularly is this true in light of the defendant's power to affect the price for the industry. We have in the cellophane industry a defendant here having in excess of 76 percent of the total supply and only one competitor; in caps and bands, having in excess of 66 per cent of the total supply and only two competitors.

Against that background the evidence would show a monopolization of the important trade, and under that I will discuss factually on the basis of the document this concept of channeling that we have spoken of before. I intend to show an injury through this practice to Sylvania's profits, whereby Sylvania was disenabled to a substantial degree from competing with its full effectiveness. I further intend to show the tendency to prevent others from entering the industry as a result of the discriminatory discounts.

At this time the Government refers to Government Exhibit No. 79 at page 278, previously introduced into evidence, and I
6957 invite the Court's attention to certain statements appearing
at page 280 of this report, a small part of which has previously been read. Other parts have not been read. I only intend to refer to part of this one page at this time.

(Reading.) "From the foregoing tabulation it will be seen Sylvania's percentage of the combined total volumes increased from 20.8% in 1937 to 21.8% in 1938—" the date of this is the end of 1938—continue reading: "* * * and the competitor improved his position in the moistureproof classification only. Considering the aggregate change from 20.8% in 1937 to 21.8% in 1938 in relation to the volumes in both years, there is an indicated transition favoring the competitor of approximately 198,000 pounds.

"Before detailing the specific instances responsible for this diversion of business, it is desirable to point out the general factors which were most influential.

"First, Sylvania's gains were secured principally from the larger type user, whose previous business has been enjoyed almost exclusively by du Pont. The basis on which these inroads were made was promotion of the idea of two sources of supply, backed by guarantees of indemnifying customers for any loss of rebates under quantity purchase agreements in existence with our company.

"It is a policy of many of our larger customers not to confine requirements to any one supplier unless there is a difference
6958 in price which, in effect, obtained in our favor under quantity purchase agreements. Sylvania's guarantee of indemnification nullified this advantage and eliminated, to a considerable extent, grounds on which the competitor's solicitation had been rejected previously.

"On the other hand, the competitor has not been particularly vulnerable to retaliation on the basis of two sources of supply strategy since there are few large units of business held by him exclusively."

Now, there we have three statements, one, the last one just read, "there are few large units of business held by him exclusively"—du Pont had those. They admit that in the early part of it. The second is, they could continue to have them as long as these discount agreements remained in the shape they were in prior to 1938. But then something happened. Sylvania came along with a guarantee of indemnification against loss by virtue of these rebates, which nullified this advantage and eliminated to a considerable extent grounds on which the competitor's solicitation had been rejected previously.

Now, there is a clear instance of the effect of channeling up to this time, up until the time this indemnification guarantee was brought into effect by the Sylvania Company.

I would like to stop for a minute and consider what that indemnification against loss meant. We have seen the du Pont discount schedule; we have seen how it worked. It was possible for a purchaser over the course of a year, if his
6959 purchases ran high enough, 1,500,000 pounds, to achieve a ten per cent discount, and starting all the way at ten to fifty thousands pounds, from 2½ per cent going up in quarterly brackets.

Now, Sylvania, it is quite obvious from this document, was trying to get some of this business. The customers obviously said to Sylvania, "How can we give you any of the business? If we split our business we will drop into a lower discount bracket." Sylvania was faced with an alternative there either to permit this channeling or do something about it. So they gave this indemnification against loss. That meant that if a customer split his purchases, Sylvania would indemnify him against any loss that he might incur as a result of giving them some of the business. If he cut his purchases so that he fell from a ten to a five per cent bracket, then it was up to Sylvania to indemnify him. Now, what does that mean in effect? I will come to that later.

Mr. Gesell. Your Honor, may I inquire as to what the Government's contention is as to what Sylvania's discounts were?

The Court. I was about to ask the question, where is the proof as to——

Mr. Gesell. For all we know on the record they were greater than du Pont's even without the indemnification.

The Court. My point of inquiry was whether Sylvania
6960 entered into its discount program as a result of that which had been done by du Pont or whether the converse was the fact, namely, whether du Pont worked out its program in order to meet the blueprint of Sylvania.

Mr. Minicus. The documents quite clearly show that du Pont had a quantity discount program as far back as 1926, before Sylvania was ever in business.

Mr. Gesell. But they don't show what Sylvania's discounts are, your Honor.

Mr. Minicus. Mr. Hamburg stated very definitely on the stand——

The Court. All right, if it is in the record, let's not pause at this moment. We will find it. I want to get along today.

Mr. Minicus. It is quite clear if Sylvania had to indemnify against loss, they didn't have a greater discount schedule than du Pont. As a result of this indemnification it is quite obvious that they had to pay greater discounts because if a company was buying a million dollars worth from du Pont and only $200,000 worth from Sylvania, Sylvania had to give him the full discount on $1,200,000 worth to indemnify him against loss.
6961 Now, just think of the effect of that on Sylvania's profits, and here I think a coudt is being presented with a beautiful illustration. We couldn't have a more perfect illustration of the two types of monopoly power that I have been dwelling on all the way through this case. The one is the sheer power by virtue of its control of supplies, its dominance. The anti-competitive effect of that is very beautifully illustrated in the freight equalization situation that Mr. Hamburg spoke about. Mr. Hamburg testified on the stand in response to defendant's cross-examination that they equalized freight in accordance with du Pont's practices.

Now, your Honor will recall that a chart was introduced into evidence that showed the exact location of du Pont's plants, and if your Honor will recall, those four plants made a quadrilateral completely covering the northeastern quadrant of the United

States. There was one in Buffalo, a couple in Richmond, Virginia, a couple in Old Hickory, Tennessee, and one up in Clinton, Iowa. Now, somebody was going to order from all different parts of the United States. There were freight charges entailed. If a fellow was in Chicago, he bought from du Pont, he bought at Clinton, at a small freight charge. If he wanted to buy Sylvania, he would have to go way down to Fredericksburg, Virginia, right next to the du Pont plant in that southeast corner. He would have a bigger freight charge, so here again Sylvania
6962 was required to equalize freight with du Pont. The fellow in Chicago would only have to pay the freight from Clinton to Chicago. Sylvania made up the rest. That came out of their profits.

Now, there is an illustration. I don't say—I don't want to be misunderstood about this by the defendant—that they can't build plants wherever they want to, but that is the kind of monopoly power we are talking about qua power, and the effect on Sylvania's profits is the kind of impediment the competition is up against trying to meet that kind of power.

Now, on the other hand, we have this predatory exercise of power in this quantity discount situation, where now, instead of being able to follow the discount schedule which was the same as the du Pont schedule, they had to pay bonus discounts above that to indemnify customers against loss, because du Pont had this thoroughly violative discount schedule in effect. If they didn't do that, the business would all be channeled into the du Pont Company.

Now, there is a second type of monopoly power that we have been discussing in this case, and I think the two of them place a very beautiful contrast for the Court. Then, of course, on top of that, affecting Sylvania's profits, and as a result of power, with the millions of dollars that Sylvania had to pay du Pont in patent royalties; this must have been a very, very profitable business if Sylvania ever survived all of that.

6963 The Government offers in evidence Government Exhibit 5517 at page 6291. The first page of this exhibit, your Honor, is a covering letter from Mr. Hatt to Mr. R. R. M. Carpenter and is dated September 19, 1938. The purpose of the covering letter is merely to state that there is a memorandum attached which sets forth du Pont's relations with the A. & P. Company and du Pont's efforts to sell the A. & P. Company.

(The letter dated September 19, 1938, from J. E. Hatt to R. R. M. Carpenter, with memorandum attached, was received in evidence, and marked, "Government Exhibit No. 5517.")

Mr. Minicus. Reading from the first page of the memorandum, at page 6292:

"We have not sold the Great Atlantic & Pacific Tea Company for some considerable period, approximating five years.

"They are substantial and important buyers of transparent sheeting, and from our earliest manufacture of this material we have solicited them for their business as a prospective outlet in the early days, and later as a substantial user during more recent periods."

So the du Pont Company did not have the A. & P. business in 1938.

Moving now to page 3 of the memorandum, at 6294, the last paragraph on the page:

"The basis of sale of 'Cellophane', as well as competitive
6964 transparent sheeting, is at a net price per pound in rolls
and quantities in excess of 500 lbs. at a time, but with the further sales agreement that for purchases of substantial amounts during the course of a twelve months' period there are certain quantity discounts that are allowed to such important trade as can buy a quantity in excess of $50,000 per year, allowed to them in cash at the expiration of that sales agreement. This quantity discount schedule is a sliding scale based on the quantities purchased in dollars. Inasmuch as they buy perhaps in excess of $500,000 per year, this would entitle them to a discount on the sum purchased of 5%. If they bought only in excess of $300,000 the discount would be 4%. They feel, therefore, that they cannot afford to split the business between two suppliers because of the difference in discount and they, therefore, have confined their purchases to one concern."

Mr. Gesell. i. e. Sylvania.

Mr. Minicus. I think that is quite clear. I haven't hidden that fact.

"No claim is made that they get more than the scheduled discount"—and here is a du Pont admission that the schedules are the same—"and we believe that under the Robinson-Patman Act that they could not accept legally more than the scheduled discount of the supplier. Likewise, they could get the same quantity discount
from us for the same quantity that they can from the com-
6965 petitor. Hence, it becomes a question of their willingness
to give us all of the business in place of giving it all to competition."

Now, therein resides the full effect of the discount schedule, that we call channeling, and du Pont feels that because of its dominance in production it should have it. It doesn't have it now.

"They have given it all to competition for several years now and they might very well be justified in giving it all to us for a year or two, to determine whether or not the service and cooperation which we can extend, together with the quality of material which we can deliver, is as important as we say in justifying this request."

I call your Honor's particular attention to the next statement:

"This concern is the only large important buyer of transparent sheeting of this size that we do not supply at least a considerable portion of their requirements, and hence we feel fully justified in asking for this business."

Now, that is quite a statement. I think this cryptic remark is explained on the preceding page, where, in the middle of the page, we see the statement, "* * * all as a reason why they as leaders in their line would be justified in buying from leadership in this line * * *."

Continuing reading on page 6295, the next to the last paragraph on the page:

6966 "There is no apparent reason except the desire to secure the top discount for quantity purchases that induced A. & P. to give all of their volume to the competitor. He has had this for several years. Likewise, there appears to have been no good reason for taking it away from us at that time except the question of the major discount. Hence we feel that there is no reason why we should not have an opportunity at this business for the next year or two, to prove our position of superior service, constantly improved quality, and continuously lower prices, with ultimate satisfaction to the most discriminating trade.

"On this basis we ask the serious consideration of the A. & P. Company toward giving to the du Pont Company its transparent sheeting business, with every assurance from us that every effort will be made to insure them high grade satisfactory service with a minimum of trouble and cost to themselves."

So in this document we see, as it applied to the Sylvania Company, the full effect of channeling. However, I do point your Honor's attention to the fact that du Pont says that this is the only large account that Sylvania has exclusively.

Mr. Gesell. No, it doesn't say that at all.

Mr. Minicus. I will re-read it so we won't have any question about what it says.

6967 "This concern is the only large important buyer of transparent sheeting of this size that we do not supply at least a considerable portion of their requirements, and hence we feel fully justified in asking for this business."

The Government refers now to Government Exhibit No. 80 previously introduced in evidence. I would like to refer briefly to page 4 of this exhibit, at page 295 of the bound volumes, beginning at the top of the page:

"Efforts to maintain a proper balance between these various factors led to certain situations where the competitor's product provided superior performance in specific characteristics."

This is a competitive report of 1939. It is the year after the one just read.

"Deficiencies in quality thus opened the way for an alternative source of supply.

"Second, creation of large units of business with individual accounts combined with the quality problem to force important customers to divert a proportion of their requirements to more than one supplier as a matter of purchasing policy.

"In 1938 Sylvania made a series of raids against our larger units of business, offering inducements in the form of guarantees against loss on quantity rebates which these customers expect to earn in purchases from us.

6968 "Against these tactics, there was little opportunity for retaliation: the large units of business—except for ten or twelve—were already in our hands and we were in a vulnerable position."

We see that this indemnification or guarantee against loss that was begun by Sylvania, as it says here, in 1938, was quite efficacious in putting a stop to the channeling effects of the quantity discount schedule. In other words, they were forced to do this regardless of the effects on their profits, but it is quite obvious, to give these large discounts on relatively small sales, must have a very serious effect on their profits.

Mr. Gesell. It might very well have substantially increased them, your Honor.

Mr. Minicus. They still were not enabled to sell these large customers at the same price on split order that du Pont was selling them. Even if it increased Sylvania's profits, du Pont was taking a larger spread because they didn't have to meet anybody's price.

When we are speaking of profits in relation to discounts, the standard has been formed under the Robinson-Patman Act. We are thinking about the profits of the person granting the unlawful discount vis-a-vis the other sellers at that level. One can't permit his competitor to make larger profits year after year and

6969 except to stay potent in the battle of competition with it.

"The competitive situation, therefore, was altered measurably when we regained the larger share of the business of the Great Atlantic & Pacific Tea Company in December 1938, an account which had not bought directly from us since 1933 and 1935."

So they did get the only large account that they were not supplying in large share.

"A. & P., begining in mid-December 1938, bought 68,064 pounds and for the full year 1939, bought 1,739,450 pounds. Transfer of this business to our account represented not only the largest single transition in 1939, but was more than sufficient to offset the benefits derived by the competitor through his infiltration in other directions in 1938."

The Government offers in evidence Government Exhibit 5563. This is a new document, and I hand one copy up to the Court. This is a letter from C. M. Albright to Mr. B. M. May, with certain attachments. The letter is dated February 2, 1942.

(The letter dated February 2, 1942, from C. M. Albright to B. May, with attachments, was received in evidence and marked "Government Exhibit No. 5563.")

Mr. Minicus. Under the caption "Quantity Discounts" Mr. Albright writes:

"You will recall the quantity discounts on Rayon and 6970 Acetate Division yarn and staple were discounted during the year 1936. The Cellophane Division quantity discounts paid since 1936, by years, have been as follows."

Then follows a table for those years of the quantity discounts, the amounts of the quantity discounts paid out by the du Pont Company.

"1937	$917,300
"1938	1,036,927
"1939	925,390
"1940	827,863
"1941	937,170"

The total for that five-year period in quantity discount paid by the du Pont Company amounted to $4,644,650.

"We have taken advantage of the opportunity resulting from National Defense during last year in discounting the following items:

Cash Discount—Department (Ex. Sponges).

Agreement to Meet Competitive Prices with Certain of our Customers—Acetate and Rayon Divisions.

Jobber Arrangement with Atlantic—Acetate Division.

Advertising Cooperation—Cellophane Division.

"Since we are now allocating Cellulose Film, the writer has difficulty in reconciling our present policy in not also taking advantage of this situation for discounting volume discounts on Cellophane and 'Cel-O-Seal'. Of course, the argument would be that some of the larger users would probably use less Cello- 6971 phane without the benefit of the higher discounts. As opposed to this argument, we could get along with less business and still substantially make the same return on our Investment. This would also have the effect of conserving much needed raw materials.

"In addition to the allowances made averaging in excess of $900,000 annually, there are also other appreciable savings, difficult to evaluate, which could be made in paper and administrative work for negotiating the agreements, in time and traveling expense and for establishing necessary records for paying these discounts."

So the discounts themselves were not an unmixed blessing. Even the mere fact and presence of the discount added some cost to the company's operations.

Mr. **Gesell.** I think the record will show that is written by a man in the Control Division during war-time price control.

6972 Mr. **Minicus.** Very good. I am glad Mr. Gesell pointed that out. I almost forgot something at the top here. There is a hand-written note at the top of this letter, "Talked to LAY and JEH," presumably Mr. Yerkes and Mr. Hatt—"will defer action until next price revision, BMM, 2-6-42." Now, Mr. B. M. May was the Assistant Manager of the Rayon Department. I had almost overlooked that. I am sorry, your Honor.

Mr. **Gesell.** The letter is addressed to him.

Mr. **Minicus.** Now, turning to the attachments to this letter, the second attachment, on page 3 of the exhibit, there is a statement, "Total Cellophane Division accounts involved 342." That is the number of the agreement accounts, if you please. Continue reading: "This is not necessarily a complete picture as many of these involve from two to a dozen or more subsidiaries, branches or other connections. I would estimate actual total would approximate in excess of 700."

So you can see from this, your Honor, that quite a few of these agreement accounts were covered by this subsidiary matter that we have discussed at length.

Turning to the last page of the exhibit, we find it preceded by two pages listing the various agreement accounts by name and the amount of the discount payable to each account in this particular year.

6973 Then at the bottom of the whole thing, we see the total of 302 accounts. Then below that, in hand-written notation, are listed the six cigarette companies, American Tobacco, Brown & Williamson, Liggett & Myers, Lorillard, Philip Morris, and Reynolds. Opposite that is the amount of the discount they were rebated. And we note there a total is taken and that these six cigarette accounts received in total rebates on the quantity discount in that year, $500,000—the six accounts got $500,000.

Now, moving our eye up the page a little way, we see that the entire 302 accounts received $891,803.06. In other words, the six cigarette accounts received over 50 per cent—six accounts out of 302 received over 50 per cent of the entire value of the discounts rebated that year. To be precise, they received 56 per cent.

Now, taking du Pont's top ten accounts, that is, the six cigarette accounts, plus Continental Bakeries, Great A. & P., Kroger and Purity—and it is interesting to note that A. & P. is now in the top accounts, as shown by this listing preceding—we find that du Pont's top ten accounts received 70 per cent of all the moneys paid out in discounts for that year.

Now we see that 184 accounts under $500 received $63,443. In other words, of the 302 accounts more than half, or 184, that is, about 60 per cent of all the accounts, participated in this rebate system only to the extent of 8 per cent.

So it is quite apparent from that exhibit where the
6974 discounts were going, to what sort of trade.

Turning back to page 4 of this exhibit, we find a very similar analysis, laid out on the agreement accounts for caps and bands. There we see certain very large payments and very many small payments. We notice that Seagram's runs over $12,000, where the average here is somewhere around $500. At any rate, the top five accounts in caps and bands received 78 per cent of all the discounts paid in caps and bands.

Now, bringing this point to a close, I would like to refer briefly to Government Exhibit 5023, which we discussed yesterday. There are several points in conclusion I would like to show as to how this concentration of monopolization through this discount system worked out. Page 4469 of Government Exhibit 5023, we note here that du Pont has listed 29 accounts purchasing over $100,000 in this year of 1941—29 accounts purchasing over $100,000. And we notice that these accounts are laid out in the order of their size and it is very easy to see that the first ten accounts purchased in that year $8,198,000. That is the first ten accounts of du Pont. And referring to Government Exhibit 414, the Sylvania document, wherein it is set forth the direct sales for that year, we see that this $8,198,000 sold by the du Pont Company to its first ten accounts was just about equivalent to all of Sylvania's direct sales in that year. Also that in that year Sylvania's first ten accounts purchased $2,601,000 worth of cellophane on
6975 direct sales, and that that was less than the first two accounts of the du Pont Company. Ligget & Myers purchased $1,400,000 and the American Tobacco Company purchased $1,385,000. Those two accounts purchased more cellophane than Sylvania's top ten.

Now, the evidence has exposed the discriminatory character of the defendant's pricing system, as well as du Pont's constant awareness from 1936 through the years—and this fact was always being pointed up—the constant awareness that its so-called quantity discounts were not justifiable on any basis of cost savings.

Also very noticeable is the fact that the motivation back of this discount system at all times remained the exclusive retention of the important trade, repeated in every document, time and time again—what will the important trade do?

We have also observed at least the dubious legality of this merchandising discussed within the company as far back as 1936, twelve years prior to the institution of the present suit. From time to time thereafter this matter was repeatedly brought to the attention of management, yet nothing was done—procrastination, delay, wait until the next price change, wait until the war is over, wait until general maximum goes off, but nothing was done. The documents are replete with that kind of procrastination.

Why should this obtain? Here we have one of the larg-
6976 est organizations in the world, one whose leadership it is
reasonable to believe should be exemplary to all. There is no doubt about that. Smaller business men, stockholders, citizens should look to this sort of an organization for leadership, I believe anyway. Yet over a great many years they consciously dallied with commercial practices they knew themselves to at least be very questionable. Even if one accepts the most lenient interpretation of its activities, that is, that the management merely attempted to run the sidelines of the law as closely as possible without stepping off stride, in this case the defendant was still out of bounds on the 50-yard line. The Government insists, however, that the documents permit no such an opology. In this instance, as was the case with the decision of world markets, the patent abuses, the specific exclusions, and the many other monopolistic practices which have been exposed by the evidence, this defendant was aware of the nature of its activities and could only seek to justify them through clumsy subterfuges, for the sake of the ends to be obtained, namely monopoly power.

In the field of its distribution it is clear from the documents that the primary objective remained at all times their retention, either exclusively or to a large degree, of the important trade, or, as stated in one document, du Pont felt it wise to leave undisturbed the most undesirable portion of the business, concentrating
its effort on the more desirable. Examples of this con-
6977 centration are discovered in its relationships with the
tobacco companies and other large purchasers of the products involved.

It is true that at the end of 1946 this discount system was finally cancelled. They were talking about changing it since 1936. Finally it got cancelled, and when did it get cancelled? When the Department of Justice informed the du Pont Company that it intended to bring suit against it for monopolization of the cellophane industry, and after that time they cancelled this discount schedule.

I have one more matter to take up after Mr. Gesell's comments in a response to a request by the Court.

Mr. GESELL. I don't want to comment until all his documents are in.

Mr. MINICUS. My documents are all in, your Honor.

The COURT. Well, if it is simply a matter of going forward, I think we should just take a recess at this point.

Mr. GESELL. I think when you come back I can finish by one o'clock so we can have the afternoon clear for the conference.

The COURT. We will recess for ten minutes.

(At this point a brief recess was taken.)

Mr. GESELL. Your Honor, we now understand that this monopolization of marketing outlets is not being presented to the
6978 Court in terms of the allegations of the complaint, but that
the complaint has been watered down and we have a somewhat different charge—monopolization of important marketing outlets.

Of course, it seems to us that the fact that somebody has desirable customers, desirable clientele, does not mean a great deal in itself, and that what we have to look at is How did we get the customers and how did we hold them? It seems to me in all the peregrinations we have had through the phases of the Robinson-Patman Act the issue is How did we get important outlets and how did we hold them?

We were informed that the principal important marketing outlets were Shellmar, Debeckmun, Travers in the converter field; Minnesota Mining, who makes Scotch tape, a fabricator; and the tobacco companies and A. & P. The first question is How did we get those customers? Well, we were first. Du Pont was the pioneer. It developed the product cellophane; it patented and invented moistureproof cellophane which is necessary for the tobacco companies; it developed the interest of these companies in the product. It helped them develop the market and then it met the needs of the customers by furnishing high quality goods and excellent service. The converters, as the record shows, started from nothing. There were no converters when du Pont started this business. No converters of cellophane. Shellmar and Debeckmun and Milprint and some of the others grew up in
6979 this business as the business grew up, and the record shows
in Government Exhibit 438 that du Pont had finally persuaded the cigarette companies to give up glassine and take cellophane as early as June, 1931, and at that time Sylvania was not only infringing du Pont's patents in its preliminary efforts to make moistureproof cellophane, but, as Government Exhibit 437

shows, it was making punk stuff, sticky, that would not work. We got the business. We had the idea; we had the initiative and we were first.

Now, you could not have a clearer example than the example that has been offered by the Government as to the A. & P. We had the A. & P. business, and in 1936 and earlier Sylvania began to take it away from us. How did they take it away from us? They had a large and powerful converter named Daniels, whom the record shows dominated the meat market, and through Daniels they got a position in the important cellophane meat wrapping business with the A. & P., and gradually the business went from du Pont to Sylvania. They gave the same discounts as du Pont. The discounts were not the factor. Daniels, this important customer and outlet whom Slyvania had took the business away from us and Sylvania developed it. Now, how did we get the business back? It wasn't because of discounts, because Sylvania's discounts were greater than ours. They not only matched ours, but they offered the extra inducement of the guarantee, and the exhibit that was introduced this morning 5517, from which
6980 we had a couple of paragraphs at the beginning read and a couple of paragraphs at the end read is a long detailed account of how A. & P.'s business was gotten back by du Pont, and it was by this creative selling that I talked about yesterday in discussing a post-war problem, to which the rebuttal was "These were the great, dreamy hopes of du Pont for the future and we will never find any evidence that they ever did it"; and here is a document dated back in 1938, September, that shows that creative selling and how it was that the A. & P. business came back to du Pont, and it shows it was not discounts, it was not this theoretical notion that the Government has been urging for two days, but it was hard work.

Look at just a bit of this document. I can't read it, it is too long. It shows, first of all, that we thought the account was so important that we were to assign a specialist to it, a man by the name of Rankin, and he spent a considerable period of time, 20 to 25 per cent of his time, developing the account; and when did that start? That started way, way back. We extended cooperation to A. & P. as early as March, 1930, the document says, in working out the details of their packaging and getting wrapping machines in successful operation to accomplish it.

Then Mr. Rankin took up with the A. & P. problems relating to the packaging of sliced bacon and worked in Pittsburgh
6981 with a concern, and as a result of what he did it was reported that the manager in that district of A. & P. had a 1400 per cent sales increase in bacon; and then Mr. Rankin went

to other places—Columbus, Indianapolis, Cincinnati, Toledo, and Detroit, and supervised the details of A. & P. installing the same kind of bacon merchandising methods with cellophane that had been so successful in Pittsburgh. Then he went to work with the Louisville branch of the A. & P., wrapping cakes in cellophane, and installed a new idea that resulted in a very large increase in their sales volume in the district. Then he went to work a year later in Canada and showed them how they could take care of this on their wrapping machines, and then in 1933 came the baking industry, and he went to work with them on specialty breads and sweet dough products when wrapping machines were not designed to run transparent cellulose film, the document says, and our local representative, an engineer, spent considerable time in the A. & P. bakeries at Detroit, Chicago, and Toledo making machine changes and adjustments which resulted in the effective use of transparent wrapping on these products; and then in the Midwest Division of A. & P. Entirely and due to the aid of du Pont, the Production Organization, they were able to make progress. The document says "This is the type of cooperation we have been accustomed to offer them." It says, "We continued to honor their request for assistance from the field from time to time, even though it
6982 has been quite some time since we have enjoyed any of their business."

In 1936 it says in the Pittsburgh district they became interested in a method du Pont developed for packaging and marketing drawn poultry. "It saves time and waste in their poultry department," the document says. This system du Pont installed and then followed up with them. Mind you, they are not buying anything from du Pont. Followed up with them where? In New York, Cleveland, Minneapolis, Philadelphia; and the document says, "Du Pont was the first to work out this idea completely on a practical packaging basis," and there is more and more of it in the document.

And against that single example as to A. & P. of constructive creative selling and the gradual development of this account until the business came from Sylvania to du Pont in part, not in whole, you are asked to say that the reason it changed was because of the discount system, even though Sylvania paid more favorable discounts than du Pont. It just does not wash. It is more of this theory without supporting fact.

We are told that this had a detrimental effect on Sylvania's profits. There is no proof of that. We don't know what profits Sylvania made in this case. We don't know whether they made more, we don't know whether they made less, as a result of their discount.

6983 Then take the tobacco contract, which was discussed at such length, and the whole series of Reynolds contracts put in as an example of a large customer, this time the tobacco company. Those contracts could be cancelled at will by Reynolds and did not require Reynolds to buy a single pound of cellophane from du Pont. Hogtied? An open end contract that obligates them in no way to buy from du Pont. I just don't get it. And what is the end result they are talking about, du Pont having all the important accounts? We have got a list of Sylvania's ten largest accounts, and they look pretty important to me. Taking the years in the forties, which the Government selected, I presume, because they were the best from their point of view, look at what they show: Reynolds Tobacco Company, Ward Baking, Great Atlantic & Pacific, Purity Bakeries, Inc.——

Mr. MINICUS. If he reads these off, may I ask that he read the amount they purchased while he reads the accounts?

Mr. GESELL. American Tobacco Company, Kroger Company, American Chicle, General Baking, Columbia Baking—large important companies, buying frequently in excess of 1,000,000 pounds.

So on the facts I cannot see any monopolization of these customers, important customers, nor can I see any evidence that where two producers were both selling to the same customers at the same discount, which permits the Court to infer that because one was successful and the other was not, it was the result of the discount, particularly when we have proof that it was the creative selling that did the trick.

6984 Now, let's come to the law point, whatever it is, relating to these quantity discounts to the direct users. It is perfectly clear and well recognized that the Act did not eliminate the quantity discounts and was not intended to, and it is also clear that customers participated in all brackets of the discount system, as has been shown very elaborately by the Government's documents.

I thought the other day I had straightened out the confusion at the Government's table as to the meaning of the Robinson-Patman Act, and then today we had it taken back again. But we rest on the statement which was worked up over the luncheon recess by Mr. Renninger, when this dilemma took place before, and which he brought in to your Honor as his way of resolving the difficulty. It appears at page 3723 of the transcript:

"I would like to point out to your Honor that Mr. Minicus and myself do not take inconsistent views. Under both of our theories the discrimination is at the secondary level, but the monopoly is at the primary level, and as we are proving a monopoly we are interested in the primary level. So Mr. Minicus is correct in our opinion when he stated that we don't care whether the discrimination resulted in a tendency of monopoly at the buyer's level; but we both say that the price discrimination itself has resulted in a monopoly at the seller's level."

6985 Now, we accept that. Mr. Minicus does not accept it.

Mr. Minicus. I do, sir.

Mr. Gesell. This says that the discrimination is at the secondary level and before you can get up to this primary level you have to under this Act find some discrimination between the buyers at the secondary level.

Mr. Minicus. I would like to have the record show, your Honor, that I do agree with that statement one hundred per cent.

Mr. Gesell. That is exactly what the Act says. It is exactly what Mr. Renninger says, and now we have Mr. Minicus for it.

What was the discrimination? Where was the proof of the discrimination, your Honor? Let's take the tobacco companies. Mr. Abrams and Mr. Haskell looked at it through the years, and not until some time in 1943 did they see any discrimination at the secondary level. It is not a cost problem. It has to do with whether the price of the cellophane was such that as between two cigarette companies if one got a slightly different price than the other their competitive relationships were affected adversely. And the Act says, your Honor, "Substantially to lessen competition". It does not talk about anything but substantial.

Let's look at it. At 41 cents a pound, which is the price that cellophane had during this period, if you compute what it cost to wrap a cigarette, it is one-twentieth of 6986 a cent, or half a mill a package. And the entire discount, that is, the difference between the top and the bottom—and we see that all cigarette companies at least got in the middle—but the entire discount is a difference of one two-hundredth of a cent a package, and that is what Mr. Abrams and Mr. Haskell meant when they said they could not see in that situation a discrimination between the buyers at the secondary level. And we are now all in agreement that unless it took place, the primary level does not come into effect. This infinitesimal difference of one two-hundredth of four-hundredth of a cent didn't injure one tobacco company as against another. And if it didn't, there was no discrimination as between them, and as we all are now agreed, unless there was a discrimination, the question of whether it injured Sylvania or didn't injure Sylvania makes no difference. That is why, your Honor, when you get to functional discounts, Mr. Minicus' interpretation of what Mr. Renninger says proves incorrect. All over the United States today there are functional discounts, differences of prices to different kinds of buyers, well recognized, accepted by the Courts and accepted by the Commission. But in those cases there is a difference of price, and if only the difference in price was involved, then in every case where one was competing with another, you would have an illegal price. But they have been constantly upheld, and the reason why 6987 is that although there is a difference in price, they are sold to noncompeting customers, and there being no discrimination at the secondary level, the rest of the Act does not come into operation. I think it is just as simple as that. And that is certainly what Mr. Abrams and Mr. Haskell thought, and that is why the cases have said—in fact, it is what the Government said even in its brief in this very recent Morton Salt case to the Supreme Court—and it is what the decisions have held starting with the Kraft Cheese case, way back in 1937, which these gentlemen had before them at the time of their opinion presumably, and it is what the Commission Compliance and Complaint program in 1937 as disclosed in the Congressional Record, 81, at page 2336, shows. Unless the difference is substantial and sufficient to create this discrimination at the secondary level, the Act does not come into play.

Now, the Government cites and relies on the Brill case. We had that presented to the Court in the argument. But the facts in the Brill case show that the difference in the discount meant the difference in profit or loss to the customer on the secondary level. And it was held there that where the discount was of that kind, obviouly it was discriminatory, obviously the competitive effect at the secondary level, and obviously a violation of the Act. But that is something quite different than a difference of one two-hundredth of a cent between two large tobacco companies wrapping cigarettes.

6988 Now, in 1943, as document 5020 shows, Mr. Abrams and his associates in the Legal Department of du Pont began to become concerned about these discounts, and their concern was because of new and developing decisions under the Robinson-Patman Act and the fact that the gross amount of the discounts, the gross amount of them, was becoming so large as this new use for cellophane had developed that the question arose whether a difference of some $100,000 in the discount paid one cigarette company as against the other might create a sufficient difference in price to make the Act operative.

So while the document shows they thought it was doubtful, they considered maybe the system was vulnerable. We were then in the middle of the war and in the middle of price control, and 50 days after the price control went off, these were changed.

There is another factor, your Honor, that relates to these discounts which seems to have been avoided a little in the discussion. It is recognized everywhere that you are entitled to meet your ompetitor's price. And we finally have it in effect that Sylvania ad the same discount, and while it isn't necessary to press the oint from our side, there is no evidence of any collusion on these iscounts, no proof offered concerning discussion of the discounts, r anything else.

Why weren't we entitled to charge the same discount as our
competitor who was selling to the same trade? Docu-
989 ment 5517, page 6294, that came in this morning, shows
that discounts of this kind were also being charged by other
ompetitive materials. So they don't meet the test as to discrimination and they don't meet the test on meeting competitive price.

Your Honor asked a question which I would like to clarify. ou recall there was a reference to the Fleischmann Yeast case, nd your Honor asked what case that was. That is the Standard rands case, your Honor, Federal Trade Commission versus tandard Brands, and the reference must have been to the Commission's Compliance Order of May 1, 1940. That case has been n and out of the Courts for a period of I guess more than ten years, nd the present stage of it is found in the C. C. H. Trade Regulation Service for '48-'51 Supp. at paragraph 62,797, Federal Trade Commission v. Standard Brands. It concerned questions of cost ustification in relation to quantity discounts and the basic question that has been hovering here in these cases until the Morton Salt decision in 1948 as to whether if a system is available to all t could be discriminatory, with or without these questions of cost ustification which were promulgated in good faith, as of course his one was.

There is another quantity discount that I want to take a few
seconds to discuss and that is what Mr. Minicus calls the price
list quantity discount, that is to say, the difference between
6990 the price of buying rolls, for example, under 500-pound lots
and buying in over 500-pound lots. Well, there—and the same situation is presented as to caps and bands this morning—there in both cases, your Honor, there was not much trouble for a jobber to reach into the higher bracket. This differential on rolls was so small it is almost negligible, and a 500-pound roll only cost $205. A fellow didn't have to put up an awful lot of money to get something more. The jobbers certainly could have reached for that. In the caps and bands these differences they are talking about came to as low as $6.20.

6991 There is one final thing I want to say about this phase of the case: You have been asked to infer a competitive effect upon Sylvania, the primary producer. I wonder, your Honor, what weight should be given—it seems to me a rather substantial amount should be—to the fact that we have had on the stand in this case Sylvania's Sales Manager, the man who through most of these years was concerned every day of his life with meeting this competition. Did he say he was kept from converters, that he was kept from fabricators, that he was kept from jobbers or agents, that he was kept from tobacco companies, that he was kept from important accounts, that he was hurt by discriminatory prices? Not a word, not a word. He was on that witness stand, and he was confronted with inferences. It seems to me it is clear that his answers would have been negative and harmful to the Government's case.

No body has appeared, and we certainly are beginning to get near the close of the plaintiff's case, I gather. Nobody—primary, secondary, or tertiary—has come forward and said he was hurt or has complained, and your Honor was told at the opening there wouldn't be anybody, and there isn't, and we are told that there is a tainted thread which runs through this case—75%. To put it another way, du Pont is big and successful. It is the same 75% we had the first day, and we are right back where we started in this case, that du Pont has 75% of the cellophane business.

6992 That is the only thing left that I can see, and putting aside the valid patent protection, the 75% will prove to be a myth as soon as a realistic examination is made of the market in which cellophane is sold.

The Court. Do you want to talk for six minutes, Mr. Minicus?

Mr. Minicus. I think I can finish it up then. Would your Honor mind? This is something that is in response to a request of the Court. I don't believe it will run over a few minutes. In the early part of the trial your Honor will remember that you expressed a desire for submittal by the plaintiff of some expansion of its prayer for release. Now, this request, according to the plaintiff's understanding, was not for a form of proposed decree at this early stage extending to the infinite details and formal language——

The Court. Does that become moot in view of Mr. Gesell's determination not to press his motion for a judgment at this time?

Mr. Minicus. You mean our submittal. I would rather not. I thank you, sir.

Mr. Gesell. I think not at all. I was planning to take that up in the conference this afternoon.

The Court. I would rather explore that problem freely before I hear any discussion of it.

Mr. Minicus. I was only submitting it at your Honor's request. I don't think Mr. Gesell has any rights in it, sir.

6993 Mr. Gesell. I am at least an officer of the Court involved in the litigation of this case.

Mr. MINICUS. The prayer, I think, is as complete as most prayers are.

The COURT. It is going to be on my agenda for discussion, and I don't wish to argue it in open Court at this time, because I don't think the period is ripe for such discussion, because I think we ought to have a common understanding as to what we are going to do with that item. That is why I think it should be on the agenda.

Mr. MINICUS. Thank you, sir. Shall we meet at 2:15, your Honor?

Mr. GESELL. Your Honor, are we going to get the Government to rest before we adjourn?

Mr. MINICUS. The Government will rest at this stage.

The Government rested.

Mr. GESELL. I thought possibly your Honor might take a couple of seconds now that we have reached this point. I think it is sometimes interesting in one of these cases to see the statistics as we come to a momentous stage.

The COURT. I was prompted to mention that myself as I closed my notebook. I have 195 pages of closely written notes.

Mr. GESELL. We were sort of checking up on it last night. I find that we probably have almost exactly 4,000 pages 6994 of transcript which we developed on 30 trial days extending over 9 weeks during which we had trials, and we have taken testimony of three witnesses. What I am more gratified in finding and looking at is that the motion that I made before the trial has been tacitly accepted by the Government, because of the bare essential minimum of their documentation that was essential for their case at the beginning, they have rested at this time on about 1400 exhibits and left out the 1,075 of the bare minimum, so we only had to deal with about 54%.

Mr. MINICUS. I think, in the first place, that that has no purpose in the record. I think that can be stricken. I might also say, if Mr. Gesell would like to hear those other thousand documents, we will start to trot them out, but we think we have established a very strong prima facie case by reducing our documents.

The COURT. I think it is only a matter of historical fact, and that is the only reason Mr. Gesell mentioned it. I could mention I had to buy a new robe because one wore out.

Mr. MINICUS. Do you want that on the record, your Honor, or not?

The COURT. About my robe? Sure, I don't care. If you want to press for that being stricken——

Mr. MINICUS. No, not to press for it. I just think it is cluttering up the record.

Mr. Gesell. What time does your Honor want to meet?

6995 The Court. 2:15.

(At this point a recess was taken until 2:15 o'clock, P. M., Eastern Daylight Saving Time.)

* * * * *

6997 2:15 O'Clock, P. M., May 25, 1951.

Present: As before noted.

(A conference was held in the Court's chambers, at which time the following matters were discussed:)

1. It is understood that Defendant's motion for judgment made on May 3, 1951, that the Government has not sustained its case with reference to caps and bands will not be pressed at this time. The motion is reserved. Disposition of it will be made prior to the termination of the case.

2. The Defendant has during the course of the trial objected to certain exhibits. These can be placed in three groups:

The first group comprises GX 329, 332, 339; Group 2, GX 5479, 5481, 5482, 5484, 5488; the third Group contains GX 548. The grounds of objection will not be set forth for the purposes of this memorandum. However, the Government shall have an opportunity to examine these exhibits in order to determine whether it will insist upon their introduction or will withdraw the same. If there is to be argument, it will be had on next Tuesday, May 29th.

3. The question as to the right of the Defendant to adduce post-complaint evidence will be handled in the following manner:

Defendant will propose a series of amendments to its Answer which will raise the issue. The Government will 6998 object to the proposed amendments. The Court will decide whether the amendments should be allowed and thus determine the issue as to what evidence, in connection with this phase of the case, will be permitted when the Defendant opens its case. There will be a reservation, however, that this ruling, insofar as it pertains to the evidence question, will not bind the Government if it has any additional cogent reason for the exclusion of such evidence. Defendant in following this procedure for the purpose of focusing the issues does not thereby concede that amendment of the Answer is essential as a preliminary to the introduction of the proof.

4. In accordance with paragraph 2 of Supplemental Pre-Trial Order Number 2, Defendant will submit a written offer of proof on the subject of competition between cellophane and other materials to the Court and Plaintiff sometime next Tuesday, May 29, with a view to an oral argument on Plaintiff's motion opposing the admission of this material being had the following Thursday. When the matter is argued, counsel for Defendant will present the

offer with such explanatory statements as to the underlying facts as are deemed necessary, to be followed by discussion of the applicable legal principles.

5. At an early stage in the proceeding the Court inquired of Government counsel as to whether or not there would be more specificity as to the prayers for relief. At the time the
inquiry was made the Government stated it would furnish
6999 the Court with such a statement. The Court was prompted
in making its inquiry, in the first instance, by the fact that it wished to place the Government's evidence in juxtaposition to its specific form of relief. Since the Defendant has stated it is not going to press its motion for judgment on the Government's case, the Court has no further interest in pressing its inquiry as to specificity of relief.

6. The matter of the resumption of the trial was discussed and it was determined that the defense would commence its introduction of documentary proofs on October 8th, running through to October 12th and, if necessary to consume so much of the week of October 15th as will be required. Thereafter the trial will resume on October 24, 25, 26, 31, November 1, 2, 7, 8, 9, 14, 15, and 16. Sometime before the last date mentioned another conference will be had between counsel and the Court to determine the rest of the trial program.

7. Defendant will submit on August 1, 1951, to Plaintiff the documents it intends to introduce in evidence, subject, of course, to the provisions of the earlier pre-trial orders. These documents shall be arranged in the order of Defendant's proof and theory of its case and shall be identified by exhibit number. Defendant has stated that the arrangement of its documents will coincide precisely with the order of its presentation of such documents
when the trial reconvenes on the 8th of October. The Gov-
7000 ernment will be required to file their objections to any
such documentary proof with Defendant not later than September 10th.

Defendant will advise the Government within a reasonable time prior to the appearance of its witnesses of the name of the particular witness who is to be called. In the event the witness is to authenticate specific exhibits contained in Defendant's case, Defendant will advise Plaintiff of the exhibit numbers reasonably in advance of the witness appearing on the stand.

By the Court:

Chief Judge Paul Leahy.

(At this point the trial was adjourned to Tuesday, May 29, 1951, at 10:30 o'clock a. m. E. D. S. T.)

7018 The Court. Let the record indicate, therefore, that Government Exhibits 5479, 5481, 5482, 5484, and 5488 are stricken in accordance with the defendant's motion.

The ruling of the Court with respect to Government's Exhibit 548 is the motion to strike is denied.

Mr. Gesell. The next thing we have, your Honor, is to present defendant's motion for leave to file an amended and supplemental answer. In accordance with paragraph 3 of the report of the conference we had in court last Friday afternoon we filed a motion for leave to file an amended and supplemental answer yesterday, and I believe your Honor has a copy of the motion before you. It recites that the grounds of the motion are by reason of the developments at the trial the defendant desires to make more explicit allegations of its pleadings as to post-complaint events, transactions, and occurrences and as to the competition which is met and continuing to be met by cellophane and caps and bands. This motion is brought, of course, your Honor, under Rule 15 of the Federal Rules of Practice.

I think it might be desirable to copy into the transcript at this time the proposed amendment for the purpose of reference, if that meets your Honor's pleasure.

Mr. Minicus. Excuse me, sir, would you mind stating which section of Rule 15 you are working under, or all of them?

7019 Mr. Gesell. I am bringing it under all three of the applicable sections (a), (b), and (d).

Mr. Minicus. Thank you.

Mr. Gesell. We have done this, your Honor, in the form of an amendment to the charging paragraphs 21, 22, and 23 of the complaint, repeating the denial of those paragraphs that was made previously.

The Court. I wish it understood that if the amendments are allowed I am not passing on their legal sufficiency.

Mr. Gesell. I didn't think that was before your Honor on a question of this kind.

The Court. There is a split of authority on that point.

Mr. Gesell. My understanding was that the only issue here was whether on this form of amendment the Court would in its discretion grant leave to amend without any decision as to the substantive character as to the weight or legal sufficiency of the defenses raised, and we are making this motion purely for the purposes of clarifying the pleadings in accordance with the program worked out at the conference last Friday. I don't understand that if your Honor grants our motion that you are under the regulations thereby passing on the sufficiency of any defense.

The Court. The split of authority is not only nationwide, but it is in this very Court itself.

7020 Mr. Gesell. I noticed that the other night in looking at the decisions, your Honor. It seemed to me——

The Court. May I have the Government's position? Maybe that will clarify it.

Mr. Roache. The Government's position, your Honor, is that such an amendment or supplemental pleading, although it is at the discretion of the Court and can come in at the discretion of the Court, still such a supplemental pleading as is being presented here and as has been held in the Southern District of New York by Judge Woolsey that this goes to the formation of a decree, and all the cases I have found on it seem to indicate, your Honor, that such a supplemental pleading is a matter to be taken up in relief and not a matter that goes to the merits of the case. We recognize, however, your Honor, that——

The Court. Well, as I understand your position then, Mr. Roache, it is this: That as a matter of procedure you don't challenge the right of the Court to permit an amendment to an answer.

Mr. Roache. That is right, your Honor.

The Court. After the filing of the original answer and during the course of the trial; but what you say comes within the statement I made earlier; namely, that goes to the legal sufficiency of the matters set forth in the proposed amendment.

7021 Mr. Roache. That is correct.

The Court. If I recall correctly—and I am certain counsel are expert enough to refresh my recollection—this matter was argued at length in either my 2-A or third or fourth memorandum.

Mr. Gesell. Your Honor has a trial memorandum in this case, the third trial memorandum.

The Court. That is the one.

Mr. Gesell. On March 15, 1951.

The Court. What does that say?

Mr. Gesell. Which deals with the issue as it arose on the plaintiff's case.

The Court. That is right.

Mr. Gesell. Of course, we are now on the defendant's case.

The Court. Did I make mention of the fact therein that the cases that were cited to me and which I read were in the main appellate opinions which were reviewing the validity of the evidence which had been introduced in the lower Court concerning substitute materials? Certainly there was evidence introduced, wasn't there, in the Alcoa case as to substitute materials, but it was rejected by Judge Learned Hand on appeal?

Mr. Roache. That is right, sir.

The Court. The basic fact is, however, it was before the nisi prius judge.

7022 Mr. GESELL. Yes. I think with respect to this post complaint matter your Honor will recall you wrote two opinions, one on post complaint and one on the substitute materials, and you did make that comment with respect to the substitute materials. My understanding of the position of the record on this question now is that your Honor ruled as a procedural matter in his third trial memorandum that the plaintiff was entitled on its case in chief, particularly having in mind the possibility of a motion to dismiss, to frame the issues as it saw them, and if it chose, to limit the proof to the period up to the date of the complaint, and it made out a case that that would not be fatal to a judgment; and you constantly reiterated through your opinion that at the stage of the trial that you were at you thought the evidence was not admissible in connection with the presentation of the Government's case in chief. You said that, I think, underlining seven or eight places in the opinion where that comment was made, and you expressly reserved the question of the post-complaint matter insofar as the defendant's case was concerned.

Now, what we are saying is that we are here clarifying by this amendment the state of the pleadings that existed in our opinion from the time of our answer; that in our denials of the continuing nature of the conspiracy, the continuing nature of the attempt, we were posing the very issues that are raised here, and that in 7023 our answer to paragraph 11 we were raising the issues as to competitive materials; and in our view this amendment merely says to clarify the issues; and, as I understand it, your Honor, under the Rules an amendment of this kind is—while in the discretion of the Court, that discretion is customarily exercised with very strong liberality, and an amendment is permitted even after judgment and after reversal and remand and after the complaint is dismissed, and is particularly intended to eliminate any procedural technicalities in order to assure a decision on the merits.

Here where these issues have been in the case from the outset, both from our documents and from our opening, as well as the discretion we have had through the plaintiff's case, there is no surprise or prejudice to the plaintiff, who has not wanted to deal with these issues on its case anyway; and in the absence of any question of delay or prejudice to the other party certainly the discretion under the decisions, as we read them, would be exercised to permit this amendment in order to focus and sharpen the pleadings for the purpose of meeting the objections that have been made and to permit us to go forward with our defense.

The COURT. Do you want to be heard, Mr. Roache?

Mr. ROACHE. Yes, I would like to make a comment, your Honor, about your trial memorandum. I think it has been misconstrued

by Mr. Gessel, because on page 1652 of your trial memorandum you state, your Honor, that "Within this circum-
7024 scription, the Government has the burden of proving a prima facie case of violation of Section 2 of the Act. This is the alleged violation within the issue joined, and this would seem to be the confines of both parties * * *" I think both parties are restricted by that statement, your Honor.

Mr. Gesell. That is on the plaintiff's case, as I understand the opinion.

Mr. Roache. No, both parties are confined.

The Court. I have page 1652 before me. Where does it appear? Is it in the first or second paragraph?

Mr. Roache. No. 2.

I might comment, your Honor, I think this would be prejudicial to the plaintiff because we have confined ourselves because of this, and I think therefore the defendant should be also confined just as it is stated in here, " * * * and this would seem to be the confines of both parties."

The Court. Traditionally it has always been the practice when the plaintiff proves a case he proves it within the frame of references of his complaint; then we get into the doctrine of the affirmative defenses sometimes.

Mr. Roache. That is correct.

The Court. And the defendant goes on and proves his case. That is why the law has always allowed the plaintiff the right of rebuttal. You are not prejudiced or foreclosed.

7025 Mr. Roache. But, your Honor, it is settled law of the Supreme Court that we are confined in our rebuttal to points raised by the defendant.

The Court. If they raise them you will be given an opportunity to meet them; if they don't raise them there is no problem.

Mr. Roache. But there would be other points that we could have taken up on our presentation, your Honor, that we are excluded from putting in because the defendant has not raised them.

The Court. I don't understand that last.

Mr. Roache. We have refrained from putting in documents or from obtaining material evidence that we could have obtained that may have strengthened our case, your Honor, that would be post-dating the filing of the complaint. If the defendant does not bring up those particular subjects in his defense we can't put those things in again. They are excluded from our case.

Mr. Gesell. I can cut this very short, your Honor. I didn't understand that to be the law, and the defendant will waive any objection to the plaintiff's presenting on rebuttal as full a case as it desires as to any phase of this case or any issue subsequent to the complaint.

Mr. Roache. Well, I would like to point one more thing out: that in your ending up of your trial memorandum, your Honor, you stated that "I shall then make a definitive ruling on whether voluntary discontinuance of the alleged unlawful practices or diminution of the unlawful status may be considered as a part of an affirmative defense." 7026

I think, your Honor, in your opinion you have taken care of everything but whether or not the defendants can bring out a good affirmative defense, and I think that is the whole question before us right now, if there is a question.

Mr. Gesell. If your Honor will glance at the portions of the opinion which I have underlined that precedes that, I think you will see the portions on which we rely in pointing out that you were dealing with a procedural matter as to how the plaintiff——

The Court. I had no intention when I prepared and filed the third trial memorandum that I was passing on any substantive matter. I was simply making the blueprint pattern of how the Government should proceed.

Mr. Roache. If the Government proceeds in a certain manner, your Honor, and confines its proof——

The Court. My difficulty, Mr. Roache, is I haven't got your point that you will be prejudiced in some fashion by allowance of these amendments in that you will not be able to go forward with proof which you have withheld I suppose for reasons of your own.

I don't like to decide abstract questions, but I can certainly say that it is a policy of mine never to exclude any proof that can be helpful to me in the solution of any problem. So could you tell me what, for example, you have in mind that you did not put in your case that you might have? As I understand the defendant's position, it waives any objection under such a procedure. 7027

Mr. Minicus. With regard to that, your Honor, may I point out if it is only on that fact alone then we are right back to where we started preliminary to your third trial memorandum. We have gone all around the mulberry bush and the defendant has come up with just the point it was arguing for in its brief on that third trial memorandum that the plaintiff has an obligation of proving facts that occurred post the date of the complaint, which is the whole issue involved in this thing. Your trial memorandum will make that quite clear, and I think very definitely decided by that is that the scope of the complaint frames the scope of the proof.

The Court. You must bear this in mind: That at all times when I prepared the trial memoranda that have been filed in this cause it was with the idea in mind that I was going to be faced with a motion to dismiss on behalf of the defendant; and, quite frankly, my approach was that I was not going to permit the defendant to

put evidence into this record which would support that motion to dismiss when that evidence more properly could be placed within
the category of affirmative defenses. That was the moti-
7028 vating idea. That was the rationale behind these memo-
randa. That was No. 1, and you can see that No. 2 followed that they were procedural in nature in the main. I said when Mr. Gesell started his offer of amendment this morning that I wanted to know at this time whether I was passing on the legal sufficiency of these proposed amendments, and those are the ideas that are going back and forth in my mind. So that I don't think I have decided anything, and if we are back around the mulberry bush I think we are properly there under my theory of the case so far.

Mr. Minicus. Except for this one fact of the legal sufficiency, and that is assuming tremendous importance here this morning, and that would apparently be quite a lengthy and detailed argument whether these things that we received yesterday constitute an affirmative defense.

The Court. As I said, I am not going to pass on that, although I have decided that a Court should pass on it and my brother Judge Rodney has decided it should not. He has respectable authority on his side and I don't have disrespectful authority on my side.

I think I am going to cut to the quick on this thing. I am going to permit the amendments, having the record clearly indicate that I am not passing on the legal sufficiency of the matters set forth therein, especially since the defendant himself has stated that these
amendments introduce nothing new into his case, but relate
7029 back to his original answer; and so far as the record is
concerned the Government has taken no exception by motion to strike or otherwise to anything contained in the original answer.

If you will prepare an order—and I think it calls for a formal order—the amendment will be allowed.

Mr. Gesell. Very well, your Honor.

Mr. Minicus. May I ask a question, sir? Will the admission of these amendments now open up all evidence postdating the complaint?

The Court. I don't know. I don't know what is going to be offered to me. It seems to me when it is put on the platter before me I have to call a strike or a ball from the Bench.

Mr. Minicus. You mean in the form of the order?

The Court. No, from the Bench at the time it is offered.

Mr. Roache. At the time it is proffered in court.

Mr. Gesell. We will tender, as I understand it, the proof and the Court will then rule on the admissibility of the specific evidence as tendered and as it comes along.

The Court. That is right.

Mr. GESELL. Now, your Honor, as far as we are concerned that is all we have today. We are in a position to deliver our written offer of proof with respect to competition between cellophane and other materials.

7030 The COURT. Before we get into that let us take a ten minute recess.

(At this point a brief recess was taken.)

Offer of Proof No. 1 and argument thereon

The COURT. What is next on our agenda?

Mr. GESELL. Your Honor, one very small matter and that is all for today. It was agreed at the conference on Friday that we would at this time submit to the Government and the Court our written offer of proof in respect of competition between cellophane and other materials in accordance with paragraph 2 of supplemental pre-trial order No. 2. I have a copy of the written offer of proof here which I would like to tender to Mr. Minicus at this time. It consists of four volumes, a blue-covered volume and three appendices—one appendice containing representative trade reports, one containing representative advertising, and one containing representative samples of converted packaging materials; and I would like to hand to him this offer at this time and hand the text to your Honor with the statement that the three appendices, which you will note are fairly bulky, will be delivered to the Clerk before the date is out. This represents our written offer of proof which the Court directed us to submit, and we are prepared to go forward and argue it Thursday morning.

Mr. MINICUS. I would like the record to show that the Government objects to the offer of proof.

7031 The COURT. Well, we are to have argument on Thursday.

Mr. MINICUS. Yes, but the objection is just to frame the argument.

Mr. GESELL. What I would like to do is to take this material on Thursday and present it to the Court with some explanatory statement of the inter-relation of the different sections.

The COURT. Will you in substance contain in your offer of proof the material appearing on the typewritten pages of the document I now have before me? Is that your proposal? Are you going to read this?

Mr. GESELL. I thought I would not read it, but I thought I would make an exposition of the main points and explain it to the Court.

(At this point there was a brief discussion off the record.)

Mr. GESELL. Perhaps Thursday we can arrange to have it marked in the record as the offer of proof.

Mr. Minicus. Your Honor, one question as to the mechanics so we will understand exactly where we are on Thursday. Mr. Gesell has reiterated today and the record shows in the last memorandum of the conference that Mr. Gesell will make certain factual statements, a statement on the law in connection with this
offer of proof. We have no position in the matter except
7032 we would like to have an understanding. Is Mr. Gesell go-
ing to take the affirmative with a rebuttal period and we will answer his statements, or do we have the affirmative with the rebuttal period and he takes his answer to us in the middle period?

Mr. Gesell. What I though we might do, your Honor, and I think Mr. Minicus is quite correct in raising this, because the sentence is a little ambiguous in the Friday report—my thought is this: I will make a statement of the facts that we are offering. The Government being the objecting party would then raise their legal argument in objection to the admission of the facts. We would then reply on the law. It seems to me that would be the most workmanlike way to put forward the contention and sharpen the issues.

Mr. Minicus. In that case we might like to reserve a rebuttal period.

Mr. Gesell. Oh, certainly. I was not trying to foreclose them that way.

The Court. Certainly.

Mr. Minicus. Just one preliminary matter: We now have the books ready for the Court, and before submitting them to the Court, the books of evidence, we will apprepriate it if the defendant would send over a person or persons to check the books before we turn them into the Court—that is, our books of evidence.

Mr. Gesell. Eliminating the non-introduced material.

7033 **The Court.** If there is nothing further before the Court
in this proceeding for today's session, we will adjourn until Thursday, May 31, at 10:30 o'clock a. m.

(At this point the trial was adjourned to Thursday, May 31, at 10:30 o'clock a. m., Eastern Daylight Saving Time.)

7034 Thursday, May 31, 1951, 10:30 O'clock A. M.

Present: As before noted.

Mr. Gesell. We have scheduled, as you Honor knows, this morning a discussion of the defendant's offer of proof No. 1 relating to competition between cellophane and certain other products, as to which the Government has taken objection. I think at the outset we should hand up the offer of proof and ask to have it formally marked for the purposes of the record by the Clerk.

The copy I handed your Honor you may keep as a work copy, because I have another copy of that.

I hand up a blue bound volume designated "Offer of Proof No. 1 on Behalf of Defendant du Pont"; and that is accompanied by three additional volumes in the form of appendices. Appendix A is designated "Samples of Converted Packaging Materials," Appendix B, "Representative Advertising 1926-1949"; and Appendix C, "Representative Trade Reports." Our offer consists of those four volumes.

(The volumes referred to were marked "Defendant's Offer of Proof No. 1.")

Mr. MINICUS. I believe the purpose of the argument this morning, your Honor, is to resolve only the objection of the materiality and relevancy of this offer of proof. As a 7035 matter of fact, we have several other technical objections under the exclusionary rules that we did not feel were to be pressed at this time with regard to this offer.

Mr. GESELL. That is my understanding, too, that we are arguing your Honor, relevance and materiality.

The COURT. Assuming that I should hold that they are relevant and material, then how do I dispose of your other objections, Mr. Minicus?

Mr. MINICUS. Why, I presume that we could raise those in the Fall when these things were finally offered in evidence.

The COURT. Just a question of mechanics: For the purposes of the record, what will actually happen to the document which I now hold in my hand designated "Offer of Proof No. 1 on Behalf of the Defendant du Pont"? Will that become a part of the printed record or is this going to be a physical exhibit?

Mr. GESELL. It is in the nature of a physical exhibit, your Honor, and I intended my remarks to develop and explain the offer and the inter-relation of the material.

The COURT. So that the record—and when I use the word "record" I use it loosely in the sense of the Reporter's transcribed minutes—will contain enough identification connecting up the physical document which is called "Offer of Proof No. 1"?

7036 Mr. GESELL. Yes, with our contentions as to relevance and materiality and the issues in the case.

The COURT. I understand fully. Proceed.

Mr. Minicus, am I called upon at this moment to rule on your objection?

Mr. MINICUS. Yes, as to materiality and relevancy, I believe that is true, your Honor.

The COURT. Well, I have to find out what the offer of proof is.

Mr. MINICUS. We are to argue that, of course.

Mr. GESELL. I think both sides, your Honor, would like to have a ruling some time before we reconvene, because it will have such an influence on the development of our case in the Fall.

The Court. I will try to give the best service available.

7037 Mr. Gesell. As a matter of introduction, perhaps it would be well for the record to show the circumstances under which this offer of proof is made.

At pre-trial, before the plaintiff's case came on, we had submitted to the plaintiff certain proposed documentary exhibits indicating that this was one of the defenses which we were making. Objection was taken to the material at pre-trial, and in your Honor's supplemental pre-trial order No. 2 of October 11, 1950, it was specified that following the conclusion of the plaintiff's case, when the defendant came to its evidence, the defendant would submit a written offer of proof as a means of focusing this issue of relevance and materiality. That is what we have done today.

During the trial of the plaintiff's case, procedural questions arose as to whether or not the competition between cellophane and other materials would be a matter of discussion on the plaintiff's evidence, and your Honor's trial memorandum of April 3, 1951, designated "Fourth Trial Memorandum" dealt with that procedural question. But here we are now concerned with an offer of evidence which the defendant proposes to make in support of its defenses to the action that has been brought here.

May I also remind the Court that we have agreed to arrange the argument this morning in the following sequence: I will explain the offer of proof, pointing up some of the more 7038 significant facts. The Government will then state its objections and the authorities on which it relies, and I will later response then to the legal issues that are raised, the Government saying it may wish to buck.

This offer of proof, if your Honor please, pertaining to the markets in which cellophane is sold is primarily relevant to three major issues of the case. First, it is relevant to the issue of intent. We have issues of intent tendered on the pleadings and as a matter of law. This evidence concerning the market will bear on the defendant's intent with respect to its price policy, its research, its plant expansion and its marketing methods. Second, it is relevant to the issue of monopoly power, an issue tendered on the complaint. It will go to the question of what duPont's powers are with respect to price, with respect to quality, with respect to quantity, its power to control the market at the distribution level, its power to exclude competitors, and to the question of the percentage of the relevant market which it holds. And third, it is descriptive and relevant of the market itself because it presents the business and economic facts in support of duPont's position on the question of the part of the trade and commerce that is involved and it demonstrates the intense competition which exists within that part.

So we have an offer here which in various ways is dire
to three major issues of the case, and if our v
7039 are right as to the relevance and materiality and the p
comes in as we expect it will, we believe this offer is
terminative of all of the issues tendered by the plaintiff on
complaint. And it is for that reason that I sought here to pre
an offer which will give your Honor, to be sure, the bare bon
this defense and not all of the detail but which will show the r
outline of it.

In the text of the offer we have four charts, eight tables
some 41 pages of summary of the expected proof. Gener
speaking, the material is assembled under broad major headi
each of which I will take up in a minute. We have said litt
to our method of proof other than as indicated by the tables
the text, but we are going to rely in addition to the Governm
exhibits themselves upon documents, statistics, testimony of c
pany officials, expert testimony, trade journals, testimony of u
material from financial services, material from the Burea
Census, market studies, physical exhibits, and the testimon
people in the business at both the producing, the selling and
consuming end.

At the outset of this, your Honor, I want to get one ques
focused sharply, because I think that we have fallen into a
taken shorthand phrase in discussing this issue of the case.
refer to substitute competition and these other materials are
ferred to as substitutes, I am afraid by myself on occas
7040 certainly by the Court, and frequently by the Governm
In point of fact, if any material here is the substitute,
cellophane, for these other materials in large part, as we will
were first in the market, are sold in larger volume, at lower p
to the trade, and it is cellophane throughout the history o
development which has been seeking to enter and has successf
entered as a new material into the existing market, and by rese
and by price and by marketing and by other methods celloph
has come to be functionally interchangeable with the exis
materials.

7041 We don't have a situation here of theory; we have on
cold, business fact. We are not arguing that at some p
if certain conditions might happen in the market there are av
able to consumers satisfactory substitutes. We are arguing
there exists today and every day in the market complete functi
interchangeable competition between cellophane and other
terials which are sold at the same time to the same classes of
tomers for the same uses at comparable prices.

Now, the first of this offer, your Honor, and if your Honor
bear with me I would like to rather turn the pages of this blue b

and describe some of the schedules and some of the charts, and perhaps occasionally summarize the text briefly:

In the opening material we set up some obvious facts, but they are important facts, because they are a matter of daily occurrence, as our offer states, in the industry, and cannot be overlooked: and that is that the sellers and producers and wholesalers and retailers of goods are the people who decide whether or not a product is to be packaged and in what way it is to be packaged. They are the consumers; they are the market to which cellophane, as the complaint concedes, and these other materials are sold, and it is the seller, producer, wholesaler, and retailer of the packaged goods who determine what the business and economic considera-
7042 tions are going to be that dictate a particular type of pack-
age, what will satisfy the functional requirements of the material to be wrapped, what cost is possible in terms of the economics of the market, what material has sales appeal, what the customs of the trade, are, what the type of packaging material must be, whether it will be flexible or rigid, and if flexible which of the various groups of materials will be taken; and we have a market, then, that is sensitive to economic and other conditions rapidly expanding and changing to which these materials are sold; and it is not du Pont as a producer of cellophane or any other producer of a material who decides what is to be wrapped in cellophane or what kind of material is to be used, if any, to package.

Against that context of the market the first fact we come to is that cellophane is a flexible packaging material. As to that I doubt if there can be much dispute. We offer to show that 95% of du Pont cellophane is sold for packaging uses and has been sold that way since the outset, and the complaint in our answer pretty well crystallize' that issue. It is a flexible packaging material.

Now, we also show, your Honor, that cellophane is sold in some fifty different types for different uses, and we describe some of the factors in this highly competitive market which have determined the development of particular material for particular types
7043 of cellophane. We offer to show, for example, that the
development of moistureproof cellophane itself was dictated by the packaging requirements of the market. We offer to show that there are particular types for filtering ultra-violet rays for preventing rotting, to permit the discharge of gases, and other considerations of that kind which are set forth. We offer to show that the chemical and market and selling activities of the Company are all related to tailor-making different types of cellophane for the purpose of obtaining an opportunity to sell in the market in competition with the other materials.

If your Honor will turn to Chart No. 1 I think we have there—and I might say there is underlining it a supporting table—a very graphic demonstration of what has taken place in the development of cellophane as a packaging material. If your Honor has that chart before you, you will notice that in 1925, the first column, we made only plain cellophane, and only 3% of it was in rolls. Then if your Honor will trace across that chart you will see the enormous importance that the new types of cellophane play in du Pont's present business. As of 1949 plain cellophane is only 9% and moistureproof cellophane is only 14%, and 77% of du Pont's production is in new improved types of heat-sealed, anchored and other types of cellophane designed, as we offer to show, to meet the needs and requirements of the market. If you will trace the development of the rolls, that also relates to

7044 the requirement of the packaging markets, because we have gone from 3% of our business in rolls in 1925 to 93% in rolls in 1949. The development by research and developmental selling of these new and improved types designed to meet the needs of the packaging trade is further proof, therefore, in our view, that we offer, that cellophane is a packaging material.

Now we come, your Honor, in the next section that starts at page 8 of the offer to a discussion of the materials that compete with cellophane. We point out—and I think your Honor will want to notice this—that there is substantial competition between rigid and the flexible materials, but we discard the rigid materials even though that competition exists.

In analyzing the flexible materials we find that if we take a group of eleven for particular study they are all materials which are sold in great preponderance to the packaging trade that are completely functional, interchangeable, and in direct competition, that we have the inside limits of this market. Actually, the market is substantially broader, because all flexible packaging materials in some quantity are included in it. But for our purposes we need only take, and that is what we have done in a good deal of this study, the ones which are in great preponderance of their sales in direct functional, interchangeable competition, and we have described those materials, your Honor, beginning at page 9:

7045 Aluminum foil, cellulose acetate, Cry-O-Rap, Grease-proof paper, Glassine, Pliofilm, Polyethylene, Saran, Sulphite paper, vegetable parchment, and waxed paper.

I am not going to pause to discuss the physical properties of these as we offer to show, but I ask your Honor to turn to the physical samples which begin at page 14 and you will there see this group as to which we have rather complete statistics from Governmental sources and elsewhere and on which we are placing particular emphasis.

7046 There are two examples of aluminum foil, both the coated and the uncoated variety, and neither of those is transparent. As to the others you will note we have placed a red sticker under the material to indicate the degree of transparency, and we have samples of each of those materials covering the pages through to 14L.

Now, your Honor appreciates that these are samples of the material as it is sold at wholesale, so to speak, as it would be sold by any of these producers directly to a peanut bag manufacturer, who is also making peanuts, and who had his own bag machines and made the bags and put the peanuts in them. This is the material in the form of its direct sale.

Now, all of these materials are sold, as cellophane is sold, direct to the ultimate user in rolled and sheet form for use by the ultimate user. Also, your Honor,—and this is a striking fact to keep in mind—they are all sold through converters, indeed, as we will see, the same converters in many cases as cellophane. There are numerous combinations, numerous methods of processing and developing these materials into various types of converted items, which I am going to show to the Court a little later in this exposition.

You will find at Table 2 in the offer, following page 15, a list of some of the principal competitors who make these other materials. It is a representative list of principal competitors.

7047 It shows that they are substantial concerns: Goodyear, Eastman, Reynolds. It shows that many of them have been in business for many years. It shows that their sales are in substantial volume and that their assets are likewise. This is as of 1950, and so we do not show the third cellophane producer who is not in business as of that year.

It is interesting to note, your Honor, that some of these materials are made only by one concern. Dewey & Almy, Goodyear and Dow are the only manufacturers of these particular materials.

The Court. Would you happen to know offhand what their percentage in that particular field of that product is?

Mr. Gesell. It would be 100 per cent. They are the only manufacturers. I am sure, for example, that Goodyear has a hundred per cent of the pliofilm business, and I think that is probably true as to the others, subject only to imports, if there are any. We are coming to figures that bear on that a little later at the end.

The Court. Very well.

Mr. Gesell. Now, if you will turn to page 16, we begin to get into the meat of the coconut.

The Court. It says here "bread and crackers."

Mr. Gesell. Well, that was one of the big fields, your Honor.

You will see here that we have listed 14 industries. There are
industries, your Honor, that use flexible packaging
7048 materials, and it is to these industries that 75 per cent of
du Pont's sales go. Then we have listed there the other materials that are sold to those various markets. Cellophane is sold to all of them, if your Honor please, but you will note the substantial groupings of materials against each of these major end uses. Bread, for example, there are eight materials. Crackers, seven. Candy, twelve—I am including cellophane in each of these. Chewing gum, ten. Meat and poultry, fourteen. Frozen foods, twelve. Potato chips, ten. Fresh produce, twelve. Nuts, seven. Dairy products, twelve. Tobacco, eight. Textiles and hosiery, eight. Paper products, nine. Drugs, eleven. And if you take this series of materials and transpose them the other way, your Honor, we find that cellophane is used in all fourteen of these groups, that glassine is used in all fourteen of these groups, that Sulphite paper is used in all fourteen of these groups, that Kraft paper is used in all fourteen, Wax paper appears in twelve, and Tissue and Foil and Pliofilm and some of the others, in eleven.

Now, I would like your Honor to take up Appendix A because I think from Appendix A your Honor can get a very clear view of this functional interchangeable competition.

Appendix A, your Honor—and perhaps I can give you a little instruction as to how to open it as we go along since it is a little
complicated—are samples of converted goods. And we have
7049 chosen again representative industries to take a look at.

Now, the first is chocolate and chocolate-coated candy, and you will notice cellulose acetate sheet in the middle which helps keep the items flat. But if you open to that you have displayed on the two pages that are open before the Court typical, representative, examples of wrappers of various kinds for chocolate-coated candy. Cellophane in all of these, if your Honor pleases, appears at the upper left-hand corner on the left-hand sheet. You will find cellophane always at the top as we go through these different examples. That is for purposes of convenience but it often has not the majority of the sales—in fact rarely. And as you go down through you will see on this, for example, the items of glassine, paper items, on the opposite page foil items, kraft items, and this, your Honor, is all in the limited field of chocolate-coated candy.

Your Honor appreciates that this is all purely representative and not intended in any way to show the volume or variety of the wraps.

We have a similar display which is not necessary to pause on which relates to hard candy, and if your Honor will pass to that and come to variety breads, which is the principal display here, I would like to discuss that with the Court a moment. That is a double spread which you will find about in the middle of your volume.

7050 The COURT. What is this covering sheet made of?

Mr. GESELL. Cellulose acetate, your Honor, one of the materials.

If you open in the middle on variety breads, you will see that there we have a four-page spread showing these different materials. Over on the left again is cellophane. The one at the top there is glassine with a plain cellophane window. One is moistureproof; one is MSC film; you notice that for California raisin bread on the left. I call your Honor's attention to the degree of over printing which you will see takes place on cellophane here and elsewhere.

Then after the left page, the bottom one is wax and cellophane, we come to a group of foil items—these are all variety breads, your Honor—a group of foil items, a group of glassine items, and a group of paper items. On the far right are the paper items, waxed bleached sulphite, for example, on black bread that appears at the bottom.

So here again we have a representative sample of the choices that are available to the consumer in the market as to the type of wrapping material he can use to put his rye bread in.

Then if your Honor would turn to one or two more of these I would like to direct the Court's attention to the one entitled "Ham Wraps" which appears two or three over. If your Honor will take a look at that, those are cellophane items in 7051 the upper left-hand corner, and although your naked eye can't distinguish the pliofilm or the kraft or the glassine or the foil, we have for other types of materials, and if anyone looks at that spread, he cannot distinguish except possibly in the case of the acetate wrap what the material is that they are made of and, your Honor, these are all in the market place wrapping ham. I think it is a graphic display of the functional interchangeability which exists between these materials.

I have been very tempted throughout here, your Honor, to show examples of hams that are wrapped in two or three of these materials, all made by the same fellow, but since they are representative we have only given a few examples in here of the complete duplication of material used.

Potato chips is the next one, if your Honor would turn to that. On the extreme left again are two examples of cellophane, and we have a pliofilm example on the left page, and on the right we pick up the glassine and other materials. Many of these, your Honor, are folded up underneath each other and if you pull them out you get a greater indication of the complete identity of commercial transparency which exists as between all of these materials with the exception of the foil.

Then finally, if your Honor would look at frozen goods, I will not take you through all of them—that is the one after the one that follows—this is a very important and developing use.
7052 You will see there one example we have given of the identical wrap in different materials in the case of Delany broccoli. You will notice at the left moistureproof cellophane fer Delany broccoli, and at the right the identical wrap in plastic-coated paper. And that, your Honor, you will find is a very often and frequent occurrence as we come to in our offer of proof other exampels of the same thing. We not only have it as to broccoli or as to frozen foods but we have it as to Delany broccoli.

Mr. MINICUS. I have remained seated a long time, your Honor. I have hesitated to interrupt. But I rise at this point to inquire whether we are at the point of argument or the point of offer of proof.

The COURT. This is simply exposition.

Mr. MINICUS. It seems very argumentative to me, your Honor, when counsel for the defendant——

The COURT. I am not accepting it in that sense at all.

Mr. GESELL. I am trying simply to state the facts, your Honor, and keep away from all theory.

Mr. MINICUS. Yes, if Mr. Gesell merely points out what the things are. But when he begins to indicate that the same manufacturer has used both of them, I think we have crossed the line of exposition into that of argument.

Mr. GESELL. His name is here in both cases, Delany Quick Frozen Foods, and I wanted your Honor to glance at it.

7053 The COURT. Go on.

Mr. GESELL. Most of these have been food uses because, as your Honor is aware, food is the principal outlet, but the next one is a non-food use, and I ask you to glance briefly at that. It relates to textiles. There you see again the functional interchangeability. There are three types of cellophane on the left, the glassine, the pliofilm, the polyethylene, another acetate example. I think these cover things like sheets, your Honor, hosiery, items of that character.

Now, those representative samples are nothing different than your Honor would find, if the work of the Court did not prevent, shopping in such places as any of these giant food stores or elsewhere.

The COURT. One point of inquiry. The cellophane which is shown in what I shall call this sample book, is that duPont cellophane or do you have any examples of your competitors' use?

Mr. Gesell. Both, your Honor. I don't know whether both are here, but I don't think we made much effort to find out whether this was Du Pont or Sylvania samples.

The Court. The only reason for my inquiry was, somewhere along the line of proof in the past there was some question as to certain types of cellophane. The record indicated Sylvania had a better quality. In other instances, Du Pont had a better 7054 quality. And I was just wondering if that was going encompass that which is found in—what is it, Appendix A?

Mr. Gesell. Appendix A. No, not there, your Honor, although I am coming to some reference to an aspect of that later. These are all converted items, your Honor appreciates. These are cases where an intermediate manufacturer converted the item to a package, and these are samples that are obtained from that intermediate group. We are going to have a good deal more to say with respect to the converting aspects in a moment.

7055 Now, so far, your Honor, I have simply shown by this table that begins on page 16 and by this appendix the functional interchangeability of these materials. Another aspect of functional interchangeability is, course, the physical properties of the different materials, and that is the next subject dealt with at page 20 of the offer, and on page 20 we list the eleven characteristics which are generally applied in the trade as the yardsticks for measuring the various physical properties:

Heat-sealability—that is the ability of the material to seal itself, your Honor, with the application of heat;

Printability—the ability to take printed matter;

Clarity, Tear strength, Bursting strength, Water absorption—that is the moistureproof question;

Moisture vapor permeability—that is the ability to let moisture out or in;

Permeability to gases, Dimensional stability—that is to say, how the material reacts under stress with respect to area;

Greaseproofness—whether or not it will let grease pass;

And an important last one: Machine running qualities, because, as we offer to show, these materials can be and often are run over the same machines in the manufacture or packaging.

7056 Then on the table you will see this group that we have selected for special study analyzed from the point of view of each of these particular factors as they are recognized in the trade and generally accepted in the trade.

Now, we offer to show your Honor——

The Court. On that last column what does "O. K." mean?

Mr. Gesell. That it will run satisfactorily. It really comes "satisfactory, good, poor."

The point before I go into the table with you that I want to stress and that this offer stresses is that no single property determines the use of the particular material. It is the composite of the properties in relation to the particular needs of the particular customer that determines the use, plus, of course, factors of price and service that we are coming to. So we look at these from the point of view of their composite standing as against these properties.

Now let us take cellophane. What does it show? Take plain cellophane, which is at the top, and this is by illustration, your Honor: It shows that it ranks very well as to heat sealability, printability, and clarity, but it is poor as to tearing. It is good as to bursting. It is poor as to water absorption. It is poor as to moistureproof permeability. It is poor as to dimensional change and it is satisfactory as to wrapping running qualities.

705[illegible] Then if you compare the general situation present there as to moistureproof and you compare it, let us say, with—let us take two of the biggest competitors in this field: Lacquered glassine, first of all. Well, lacquered glassine is better when you get to tear strength. It is not as good on bursting strength. It is better when you get to water absorption. It is better on dimensional stability and it is poorer on grease resistance.

When you get to waxed paper it is not quite as good on transparency. It is better as to tearing. It is poorer as to bursting strength, and so it goes.

The composite of these different properties is so comparable as you take this group as a whole that, as we offer to show, they are from the point of view of their physical properties functionally interchangeable, and we offer to show that none of them is so clearly deficient as to any particular one of these eleven factors as to make it unavailable in the competitive market.

Our proof will show, your Honor, that there is, for example, a wider difference between plain cellophane and moistureproof, heat-sealed adhesive cellophane than there is between M. S. A. T., so-called, and lacquered glassine.

Now we come to the next factor. That is the factor of price, and I ask your Honor to turn to page 22, and you will find on

7058 page 22 a statement of our offer as to the factors that determined du Pont's policy in the pricing of its cellophane. There you have an example in the offer of the issues of intent to which this offer is relevant.

But passing that, may I ask your Honor to turn to Chart No. 2 which plots du Pont's wholesale prices for plain and moistureproof cellophane for the period 1924 to 1950 against the prices of leading manufacturers of these other materials. Now, the first thing I want to point out, your Honor, is that these prices have been weighted against du Pont, as we have many of the other figures here.

Mr. Minicus. Your Honor, if we are going to continue to have argument on these exhibits I insist that they be authenticated. The Government would ~~not~~ put a chart in that way, your Honor, and discuss it at length and tell what the prices were, nor anything else. That is not an offer of proof, your Honor. That is a brief.

Mr. Gesell. Because, your Honor, we have stated the prices——

Mr. Minicus. I would like to have a ruling on that, your Honor. I have asked for an authentication ruling.

The Court. As I understand it, Chart No. 2 is not going into evidence at this time. This is only an offer of proof of the type of material evidence which may come forward in the future.

7059 Mr. Minicus. But, your Honor, this is going far beyond the offer. He is arguing what the prices are and he is telling you these prices are weighted and he is showing you a visual comparison between those prices and other prices, and he will argue from there as he is going all the way through this thing. We have no objection, but this is probably the longest offer of proof on record, your Honor. It has gone an hour now and it looks like it is going to go all day. I am willing to submit to a reasonable offer of proof, but I think any argument should be deleted from it at this time. Mr. Gesell has plenty of time allotted to him later for argument.

The Court. Where does this particular chart differ from the document we argued about Tuesday that you made up? There wasn't any point about that.

Mr. Minicus. Yes, your Honor, exactly. I don't know who made this chart. We don't know who made that one, but every fact in the document was already in evidence. There is barely a fact in this chart that is in evidence at the present time. Every fact stated in that chart, the table that we put in, had a reference point to it where the correctness of it could be checked. There is not a reference point in here that we are sent to to look to see if any of this is accurate. It is like this beautiful book that was put in here this morning. They just threw a label on it by Mr. Gesell telling us this was cellophane and this was acetate and this was pliofilm; and how do I know what they were or how does 7060 the Court know what they were? Mr. Gesell has a little label on them.

Mr. Gesell. I am offering to prove these facts, your Honor, and I think I should be entitled to present them to the Court.

Mr. Minicus. I have no objection to the presentation of facts. I am objecting now to the argument of them, your Honor.

The Court. I don't think it will prejudice me in any fashion. Objection overruled.

Proceed. Let us get along.

Mr. Gesell. I was saying that these price figures are weighted against du Pont, because you will notice the table says "Prices in Cents per Thousand Square Inches." They are presented on the basis of area rather than the basis of poundage.

If you see the cellophane prices against these other materials, your Honor will note that cellophane has at no time reached the price level of the principal volume competitors, glassine and waxed paper, both of which run along at a lower price. The price per pound (cents) in thousands of square inches appears on the left-hand column of the chart. You will note progressive steps by which cellophane came down nearer to the level of these principal competitive materials volume-wise. You will note the close relationship between the foil prices and you will note that 7061 with the newer films, that although tending to follow the same course that du Pont cellophane did, coming in high with the initiation of the product, seeking the level of the competing materials. On the end of the lines on the right we have indicated what the particular material is that is charted in relationship to the two heavy lines which show plain and moistureproof cellophane. What that establishes, of course, is clear that the principal competitors have a price advantage in the market.

Mr. Minicus. I have an objection to that statement, your Honor. This matter is all going into the record, your Honor. It is going to be a part of the record of this case. Documents are being discussed that have not been admitted in evidence yet. When I tried to do that inadvertently because I forgot to move a document in, Mr. Gesell had an objection. We are building a record here, your Honor, and I am doing my best to protect it.

Mr. Gesell. So am I.

The Court. It seems to me that this may never be in the record. I have to rule on it. So at this point if it is in the record it is only tentatively, and if I decide that I don't think this matter that we are going over this morning is relevant and material, that is the end of it.

Mr. Minicus. It is not, unfortunately, your Honor, because we have other objections. We have the hearsay objection and we have the authenticity objection.

7062 The Court. Those will be matters that I will rule on at the time that particular segment of the evidence is offered formally. Then it will become part of the record. I would hear your argument and I would agree with you or disagree with you. But at this point this is simply an offer of proof.

Mr. Minicus. Thank you, your Honor.

Mr. Gesell. Now, so far, up to page 25, your Honor, we have shown the actual functional interchangeability. We have compared the products as to physical characteristics, prices, and uses, and now at page 25, under the heading "Competitive Promotion and Selling"—

The COURT. Would you go back to page 23 for me?

Mr. GESELL. Yes.

The COURT. The figure in the second column is the figure I shall use for purposes of comparison?

Mr. GESELL. Price per thousand square inches.

The COURT. Yes.

Mr. GESELL. We feel that is the proper figure for comparison, your Honor, because these are packaging materials and they all have to cover an area.

The COURT. Very well.

Mr. MINICUS. He said that 95% of this stuff was sold in rolls, your Honor, and rolls are sold by the pound. That certainly is argumentative. I don't know how we can avoid 7063 it. That fact is perfectly clear. The rolls are sold in pounds and he just said this morning that 95% of it was sold in rolls.

Mr. GESELL. We have the pound prices there, if Mr. Minicus is worried about it.

Mr. MINICUS. That wasn't your answer to the Court's question.

Mr. GESELL. They show that the price discrepancy is greater and that cellophane is at a greater disadvantage if we take it on a poundage basis.

The realities of this market, your Honor, is what I am talking about, and I am talking about the facts that we are prepared to prove; and the next fact is the competition. We propose to offer and ask the Court to admit when we come to this phase of our proof a number of recognized publications in the trade such as the Modern Packaging Encyclopedia as well as numerous Governmental reports from various agencies of the Government showing the competitive inter-relationship of these materials in every aspect of them—their physical competitive characteristics, their marketing characteristics, their price characteristics, their sales comparability, and so forth.

I have mentioned some of those publications here, but the list is by no means complete, and we will come to them when we come to that phase of the case.

At page 26 we offer to prove the shifting of business that has taken place as between cellophane and these other 7064 materials, and we have listed beginning at page 26, 72 representative specific examples of various consumers who left cellophane and bought some other materials. I won't read the list, but here are cases in the pull and tug of the marketplace for one year only representative of users who for reasons other than any question of shortage, for this is a year when it was in free supply, chose to give up cellophane and the competitor got the business.

Mr. MINICUS. What proof is there in the record, your Honor, that there was a free supply of cellophane in this year?

Mr. GESELL. We offer to prove it at page 26 in the third paragraph.

Mr. MINICUS. This is an offer of proof, but now he is making statements on his offer of proof. Pretty soon we will have offers of proof on top of offers of proof which will have offers of proof on top of them.

Mr. GESELL. Why the Government wants to dodge the realities of this market, your Honor, I can't understand.

Mr. MINICUS. I am perfectly willing to meet them once I see the realities. I see nothing but an offer of proof. Proof is reality.

Mr. GESELL. He can't have it both ways, your Honor.

7065 Now, your Honor, we come to page 33. There we have examples, if your Honor please, of products which are packed simultaneously in cellophane and some other material, like the broccoli we looked at, or the peanut bags I have in my hand (illustrating), or the Kleenex, or the candy bar, or the sardines, one packaged in cellophane and one packaged in some other material, wax paper, glassine, pliofilm, vegetable parchment, or whatever it is. And these are further examples of the functional interchangeability and competitive character of this market.

Then, your Honor, we have offered in Appendix C, which is this black book I hold in my hand, a series of representative sales reports that have come to du Pont from day to day in the regular course of its business from salesmen in the field, reporting upon their calls upon customers.

Here in this group, which is representative of a much larger group, we offer to show, you will see, the salesmen reporting into du Pont about the competitive factors in the market and the reasons why they have been able or have not been able to take business from glassine and these other films, and you see reflected the statements of the customers as to the considerations which determine the utilization of one material as against another.

These are arranged in chronological sequence, as far as the 7066 selection is concerned, and there are many examples. The first one, in 1927, is illustrative. Here a salesman reports in that the company was making trial tests of wrapping an iced cake in moistureproof cellophane, and they claimed that the icing hardened and became brittle and broke, and that their examination of the cake showed that that did not happen when they were wrapped in wax glassine. And the fellow was not able to get the business.

I am not going to take the time to show other examples. There are numerous ones throughout here, representative not only of the reports generally but representative in respect of different industries, different uses, and different considerations, showing at the sales level the pull and take between these different materials in the market.

Then, your Honor, we come to one of the most important phases of the offer, and that is the problem of the competition in terms of the converted business and the end uses. That discussion starts at page 36.

There are no figures available, your Honor, of end use of these materials and in order to make a demonstration of this it was necessary to make a very substantial market survey, the results of which are reported here. As I told your Honor, we offer to show that these materials were sold in substantial quantity through converters, and so we took 19 important converters, the 19 largest that
would make the data available, and they account for ap-
7067 proximately two-thirds of all the converted cellophane.
They are listed on page 36. And we counted their invoices. And we found concrete, explicit proof of the competition.

First we have a series of ten schedules, starting after page 37. They take a group of end uses and show by converter the number of different materials that the converter uses for the purpose of making wraps for the particular end use shown. The first table relates to chocolate candy. Then we have such things as variety bread, cookies and wafers, sausage, ham and pork, powdered drink mixes, dried fruits, cheese, vegetables, potato chips. Those ten examples are illustrative and show the complete scattering of these materials, the same converter handling many different materials frequently, and a large number of different materials being used for each end use.

The COURT. May I have a point of inquiry that is not important?

Mr. GESELL. Yes.

The COURT. About the use on fresh sausage. What do you mean, to wrap the sausage itself or to wrap a package?

Mr. GESELL. Not a casing, but to wrap a package of sausage.

The COURT. It is never used for casing purposes, is it?

Mr. GESELL. No, your Honor, not that I know of. I will ask my associates.

7068 I think that is correct, it is not.

You will see, for example, if your Honor takes just the irst sheet by way of example that there are five different converters who use plain cellophane for the chocolate or chocolate-oated candy, if you take it across laterally. Then if you take t vertically, you see the number of different materials that each particular converter uses. And we have done that for these ten illustrative uses.

Then, if your Honor please, we come to charts and tables, and I ask your Honor to look at Chart No. 3, which is the long colored chart that opens out sideways from the book. Here we have taken and charted for the convenience of the Court—there are tables giving the underlying figures and I will give some of them to you as we look at the chart—these major end uses and shown the relative position of the different materials. Your Honor understands that we are talking only about the materials sold through converters to these uses.

Then we have shown by the length of the bar horizontally the number of billion square inches for that use. You will see at the bottom of the chart the indication. And by the length of the bar you get the number of billions of square inches for the use. Then within the vertical of the bar you get the relative proportion of the different products.

So we take bakery products, as an example, which is the
7069 principal use in terms of volume of these materials, running
almost off the chart, over one thousand six hundred billion square inches, and you see cellophane always at the bottom in red. And if you want to get a picture of where cellophane stands as to bakery products in the converted outlets, which your Honor will recall the record shows accounts for 35 per cent of du Pont's business, you see from this study that cellophane is but 6.7 per cent, and that papers obviously dominate that use.

Then as you run down you get varying percentages according to the tables which follow this chart. In candy, cellophane runs 24.7. In snacks, 32.1. And so forth down the list. Very large percentages appear only as to two or three relatively unimportant end uses, such as nuts and paste goods, which you will see toward the bottom.

Mr. Minicus. I draw your Honor's attention to the fact that cigarettes are not represented on this chart.

Mr. Gesell. I draw your Honor's attention to Mr. Minicus' failure to recognize that that is not a converted item and therefore it would not appear.

The Court. Could I pause and make inquiry in relation to that. Taking the use of cellophane with respect to all the products set forth on Chart 3, what percentage roughly is that of the total amount of cellophane which, for example, would be manufactured in this particular year?

Mr. Gesell. Well, the way it runs is this. The
7070 converter business is 35 percent of the total and these particular 19 account for two-thirds of that converter business.

The Court. I see.

Mr. GESELL. Now, that chart, your Honor, summarizes the tables and schedules which follow and is the result of this intensive nation-wide market survey that was made for the purpose of showing by these end uses the high degree of competition and functional interchangeability.

I am not going to pause on the tables and charts except to call your Honor's attention to Table 5. Table 5 shows which materials were classified under each of the major headings and what the volume of each material within the classification is, and here again you see the weighting against cellophane in terms of it because we have included as cellophane, as you will see on page 1 of Table 5, not only cellophane but all of the combinations of material where cellophane is joined with something else. Combinations with glassine, with kraft, with vellum paper and with grease-proof paper all appear in combinations with cellophane, some of them in small papers, some in somewhat larger quantity, but they are all classed with cellophane.

If you will turn to Table 5, you will get a very graphic illustration of the great variety of products and product combinations which exist in this flexible packaging market, and an-
7071 other way of demonstrating the common participation in
the same field of commerce.

With that picture, your Honor, we have also offered representative advertising which appears in the third of these appendices, Appendix B, and we have put there examples of the advertising in this market by cellophane and other materials over the span of years from 1926 to 1949 in various representative trade publications. Here you will see again that the manufacturers of these materials, whether they be glassine, wax paper, or what you will, are all holding their goods out to the same trade and holding their goods out as possessing the requisite properties for use in that trade. And you will see examples here also of advertising by converters who hold out to the trade not just one product but a whole line of products, of the flexible materials, all equally available for use in that trade. And you will see advertisements by package and machinery manufacturer who hold out their machines as being available for this trade and for these materials. Some of these, your Honor, I am sorry to say, have underlinings on them which were either made by myself or some of my associates or perhaps within the company itself, and those of course are not portions of the ads. They do serve, however, to focus attention in some instances at least upon the pertinent portions of the material. There are many different examples here, and I don't know how much time is necessary to go over them. They do show the variety of services that the different manufacturers have

7072 and hold out. In some cases the manufacturers list their large accounts, such as the Riegelite ad. They emphasize the various properties which are particularly important in the particular end use, and you will see that the ads there are ads by powerful, large, important manufacturers in the field.

So our sales competition testimony not only demonstrates this functional interchangeability, but it is bolstered by material as to quality, material as to price, proof of events within the competitive market itself, and I believe you will find that the offer covers every aspect of competition from the producer to the ultimate consumer.

The final section of this offer, your Honor, is the section which is based upon the certified statistics of the Bureau of Census, and it presents du Pont's position in relationship to these other materials, which I again emphasize are but some of the materials with which this direct functional competition takes place.

If you will turn to the first sheet of Table 7, you will see a summary on a poundage basis by odd years from '25 to '49, and at the very bottom the percentage which has been computed is the percentage that du Pont's cellophane production bears to the total production of this group of materials. And you will see that while it started at the beginning, of course, at less than one per cent, by '49 as to this group it had reached 15.5 per cent. Cello-
7073 phane as a total on this chart shows 19 per cent—taking all cellophane—in '49 it is 19 per cent compared with 21.7 per cent for glassine, 31.2 per cent for waxine papers, and 16 for sulphite. And if you take du Pont's percentage, which is the relevant percentage, it is 15.5.

In the tables that follows, your Honor, we have recomputed these same figures on a square inch basis as opposed to a poundage basis, and there you will find no material variation in the percentage. The 15.5 per cent compares with 17.9 per cent. The tables are prepared with imports and without imports so as to permit any form of analysis or comparison which is desired.

These figures have to be approximations because just as 5 per cent of the cellophane is not sold for packaging purposes, there may be as much as 5 per cent of some of these materials not sold.

These figures come certified from the Bureau of Census and show a very clear end result that cellophane is not the dominant material percentage-wise or any other way in this flexible packaging market.

The Court. We will take a recess at this time.

(At this point a short recess was taken.)

7074 Mr. Re ninger. If your Honor please, the Government respectively requests that the defendant's proofer of proof be denied. It is the Government's contention that any reference to substitute products such as contained in the defendant's proffer of proof or the various other flexible packaging materials not included therein is wholly irrelevant, immaterial, and incompetent, as they do not relate to any matter at issue in this case.

The defendant evidently contends in this offer of proof that cellophane is in competition with an arbitrary number, eleven to be exact, of what it calls part of the flexible packaging material field, and that all these other products should be considered and their production computed in determining whether or not du Pont has a monopoly of cellophane.

The Government contends, as argued previously, that cellophane is not in competition with these various products as a matter of law, and at this time I would like to incorporate by reference my former argument on substitute materials and ask that the statements made at that time be considered as a part of this argument.

The Court. May I make injuiry, Mr. Renninger? You say they are not in competition in law. Do you consider that they are in competition in fact?

Mr. Renninger. No, your Honor, we do not concede that either.

7075 The Court. Under your theory do you think the defendand should be permitted to show that they are in competition in fact?

Mr. Renninger. No we don't, your Honor. If I may explain my views——

The Court. Certainly, I want to get your views.

Mr. Renninger. The Government in Paragraph 21 of the complaint, the charging paragraph, charges that the defendant has monopolized, has attempted to monopolize, and has combined and conspired to monopolize trade and commerce among the several states of the United States in cellophane and caps and bands, all in violation of Section 2 of the Sherman Act. The offense charged is that the defendant has monopolized the market for cellophane and caps and bands and not that it has monopolized all markets in the packaging industry. Consumer demand has created the cellophane market. It is the Government's contention that cellophane is a distinct commodity or product and that a consumer wishing to buy cellophane or caps and bands would look to du Pont or Sylvania or Celon, and not to the manufacturers of all these various flexible packaging materials.

As the Government has stated previously and as all cases have so held, "any part of trade or commerce" as used in Section 2 of the Sherman Act means "any one of the classes of things" 7076 forming a part of that commerce. I cite again the Standard Oil versus United States, 221 U. S. 1 at page 61. It is obvious that Congress in the passage of Section 2 of the Sherman Act was not thinking in terms of substitutes. And as the court stated in Oxford Varnish Corporation versus Ault Wiberg Corporation, 83 Fed. 2d 764 at page 766, and I quote:

"There may be a monopoly of a defined sub-division of an industry as of industry itself."

And a little later, "a monopoly of a defined portion of an industry is equally subject to the condemnation of the anti-trust laws as a monopoly of an entire industry."

It is the Government's contention that any other view would make a monopolist defendant immune under Section 2 of the Sherman Act.

And I might point out here that under the Chart No. 7 of the defendant's proffer of proof no one of those seven flexible packaging manufacturers could have a monopoly of the flexible packaging field.

As the court stated in the Associated Press case and in the Fashion Originators Guild case, most monopolies give control over only some means of production for which there is a substitute. There is a substitute for practically everything. And to prove a monopoly of one product it is not incumbent upon the Government to prove a monopoly of all of the substitute products.

The purpose of the Sherman Act is to insure that a
7077 purchasing public shall have the unrestricted right to buy
that one product, that one part of commerce, whatever it is,
from a group of various independent manufacturers of that product who are in free and open competition, and that anyone shall have the unrestricted privilege of entering upon the manufacture of that product.

In United States versus Corn Products Refining Company, 234 Fed. 964, Judge Learned Hand in defining the market area of glucose and corn starch production under control first brushed aside other competitive products such as sago, tapioca, potato and wheat starches. The court noted that the most which could be said of these products was that they afforded a substantial limit upon the price of the defendant's products, because "Like any other monopoly, even a legal one, there is a limit of price at which substitutes will displace the cheaper commodity."

The court then considered the contention of the Corn Products Company that its corn starch was competitive directly with ground dry corn. Both corn starch and ground dry corn are derived from corn. The court stated that while corn starch had a higher maltose yield than ground dry corn, the brewers could use either product interchangeably since all the brewer was interested in was the maltose content of the product. Nevertheless, the court held that although these two products were usable

7078 interchangeably, there could still be a monopoly due to the actual differential in the cost of production. While such a monopoly could be dissipated by a rise in the price of the lower-priced commodity which would bring the two commodities in competition, nevertheless, such a monopoly within its limits, the court held, "may be a true one"; and, as I discussed previously, Judge Learned Hand also discussed whether you could have a monopoly of 40% corn syrup as against 85% or 90% corn syrup, and the court held that you could.

7079 The Government has offered what is, in the final analysis, the best possible proof that cellophane is such a part of commerce as might be monopolized; that is, proof that the defendant, by its monopoly and control of the cellophane and caps and bands market, by its dominance in the field, by its control over Sylvania and Celon and by excluding potential competitors from the opportunity to compete for a substantial part of the cellophane business, has a monopoly of that part of commerce.

It is submitted that, where such evidence is shown, that these monopoly powers do in fact flow from the control of the part of commerce involved, it cannot be denied that monopolization of a part of commerce within the purview of Section 2 of the Sherman Act has occurred. For language of that nature, your Honor, I call your Honor's attention to Standard Oil Company v. United States, 221 U. S. 1, pages 75–77; U. S. v. Griffith, 334 U. S. 100, page 107; U. S. v. Pullman Company, 50 Fed. Supp. 123, at 136.

I might also add that in the Pullman case, the Pullman Company was found to have obtained a monopoly of sleeping car accommodations although it contended that reclining seat coaches, airplanes and even hotels were alternative facilities, and the Court did not dignify the contention by mentioning it in its opinion.

The Court. How did you find out about it?

7080 Mr. Renninger. By individuals in the Department, your Honor.

In Farmer's Guide Co. v. Prairie Co., 293 U. S. 268, the Court considered a scheme whereby the publishers of seven general farm magazines were alleged to have conspired and to have attempted to monopolize commercial advertising to the detriment of the plaintiff publisher.

The Court of Appeals held that it was incumbent upon the plaintiff in order to show damages to prove that the restraint affected the entire farm journal advertising business of the United States and directed a verdict for the defendants. The Court of Appeals in that case noted that advertising in farm papers competed with radio, billboard, mail and general magazine advertising and held that no restraint had been shown which would materially affect the entire farm journal advertising business. Thus the advertiser had available alternative advertising media, just as the consumer here may have available substitute products.

But the Supreme Court was not concerned with the availability to the advertiser of alternative advertising media. It was concerned with the petitioner's exclusion from the opportunity of competing for the advertising in the general farm papers in that particular area. In speaking of the petitioner's right to recover, the Court made the classic statement, page 279:

7081 "Its right to recover does not depend upon the proportion that respondents control the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce."

The Court's holding is, in analysis: that the advertising in all farm magazines in the particular area was a geographical part as distinguished from the whole, that advertisements in general farm magazines were a distributive class of commerce distinct from advertisements in vocational or technical farm magazines or other magazines; and that of this distinctive distributive class of advertisements in general farm magazines, a part, namely, the advertisements in defendants' seven general farm magazines, could be the subject of an attempt to monopolize.

In U. S. v. Yellow Cab Company, 69 Fed. Supp. 170, the complaint alleged a conspiracy to restrain and to monopolize trade and commerce in the sale of motor vehicles for use as taxicabs in certain cities of the United States.

7082 On a motion to dismiss by defendant under Rule 12 (b) wherein it was argued among other things that such a charge did not meet the definition of the "any part of commerce" phrase contained in Section 2 of the Sherman Act, the Trial Court dismissed the complaint saying, at page 174:

"But the complaint does not charge that C. C. M. has a monopoly in the manufacture of taxicabs or a monopoly in the general sense of the sale of taxicabs. It is a matter of common knowledge that the large automobile manufacturers produce and sell the great majority of vehicles used as taxicabs."

The Supreme Court reversed at 332 U. S. 218, and Mr. Justice Murphy said on page 225:

"And Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or conspiracy. The complaint in this case deals with interstate purchases of replacements of some 5,000 licensed taxicabs in four cities. That is an appreciable amount of commerce under any standard."

A little later on the Court went on to say:

"The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved.
7083 As this Court stated in Indiana Farmer's Guide Co. v. Prairie Farmer Co., 293 U. S. 268, 279: 'The provisions of Sections 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce.' It follows that the complaint in this case is not defective for failure to allege that C. C. M. has a monopoly with reference to the total number of taxicabs manufactured and sold in the United States."

Thus once again the Supreme Court reaffirmed its definition of "any part of commerce," a phrase in Section 2 of the Sherman Act, and issued a clear-cut mandate that a monopoly charge was legally sufficient if it covered:

(1) any part of the United States;

(2) any part of the classes of things forming a part of interstate commerce.

either one or both of which added up to an "appreciable amount of commerce."

Let us analyze the Yellow Cab case. Therein the geographical significance of the Act was satisfied by four cities out of the hundreds of thousands of cities in the United States.

The distributive significance of the Act was satisfied by motor vehicles for use as taxicabs which the Court by implication clearly said was a part of the class of things
7084 which move and are known in trade and commerce as vehicles.

The Court said that these two elements added together equalled an appreciable amount of commerce.

Now, let us look at this case. First, we have alleged and proven a monopoly which is nation-wide and thus we obviously satisfy the geographical significance of the Act.

Second, we have alleged and proven a monopoly of the product cellophane—or in other words a distinct product; or, even to use the defendant's conception, a part of the class of things forming what the defendant calls "Flexible Packaging Materials".

the actual trial of these issues in the Fall these and a great mass of additional material will obviously be presented for your consideration.

It is the Government's contention that the question as to whether or not these various other products are or are not substitute materials to cellophane is entirely irrelevant and immaterial. To consider them at all would merely tend to confuse the basic issue, clutter up the record and only serve to drag out to indeterminable lengths the trial of this case. As the Court of Appeals stated in the National City Lines case, when it upheld the lower Court's exclusion of evidence tending to show the total sales in the national market in the products involved, the introduction of such evidence "would have prolonged the inquiry and protracted the trial."

As once stated by Mr. Justice Holmes, one objection to the introduction of collateral issues is a "purely practiced one, a concession to the shortness of life."

7089 From a review of all the cases cited in this argument and in the previous argument on substitute materials, the courts have uniformly upheld the logic of the Government's position.

As I have said previously, the cases cited in this and in my previous argument fall within two broad classifications: (1) those involving a generic part of one particular class or classification, where one type of film or varnish is alleged to be in competition with other types of film; and (2) those cases dealing with substitute materials. These cases show the extreme length that the courts have gone in holding that even a generic part of one particular class or classification is not in competition with another. And in all those cases involving substitute materials the courts have arbitrarily ruled out any consideration of substitute products.

The following list of thirty cases which I cite for your consideration bear out this contention. A few of these cases that I am citing involve products for which there are obvious substitutes, but where the issue was never raised at the trial of the case.

Shall I just give the citations to the Reporter to incorporate in the record or shall I read them, your Honor?

The Court. I may recognize one or two of them as you read them.

Mr. Renninger. Yes, sir.

7090 American Tobacco Co. v. U. S. 328 U. S. 781.

Baush Machine Tool Co. v. Aluminum Co., 72 F. 2d. 236.

Eastman Kodak Co. v. F. T. C., 158 F. 2d. 592.

Farmer's Guide v. Prairie Co., 293 U. S. 268.

Fashion Originators' Guild v. F. T. C., 114 F. 2d. 80; 312 U. S. 457.

Gibbs v. McNeeley, 118 F. 120.

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U. S. 219.

O'Halloran v. The American Sea Green State Co., 207 F. 187.

Oxford Varnish Corp. v. Ault & Wiburg Corp., 83 F. 2d. 764.

Patterson v. U. S., 222 F. 599.

Peto v. Howell, 101 F. 2d. 353.

Standard Oil Co. v. U. S., 221 U. S. 1.

Story Parchment Co. v. Paterson Co., 282 U. S. 555.

U. S. v. Aluminum Co. of America, 148 F. 2d. 416, & 91 F. Supp. 333.

U. S. v. American Can Co., 230 F. 859.

U. S. v. Associated Press, 52 F. Supp. 362.

U. S. v. Columbia Steel Co., 334 U. S. 495.

U. S. v. Corn Products Refining Co., 234 F. 964.

U. S. v. Keystone Watch Case Co., 218 Fed. 502.

U. S. v. Klearflax Linen Looms, 63 F. Supp. 32.

U. S. v. Lehigh Valley R. R. Co., 254 U. S. 255.

U. S. v. National City Lines, 186 F. 2d. 562.

U. S. v. New England Fish Exchanges, 258 Fed. 732.

7091 U. S. v. Paramount Pictures, Inc., 334 U. S. 131.

U. S. v. Pullman Co., 50 F. Supp. 123.

U. S. v. Reading Co., 253 U. S. 26.

U. S. v. Timken Roller Bearing Co., 83 F. Supp. 284.

U. S. v. Yellow Cab Co., 332 U. S. 218.

White Bear Theatre Corp. v. State Theatre, 129 F. 2d. 600.

William Goldman Theatres v. Loew's Theatres, 150 F. 2d. 738.

It is the Government's contention that to prove a monopoly of cellophane under the provision of Section 2 of the Sherman Act and as expressed by the many court decisions previously cited interpreting the Congressional Mandate, it is not necessary that the defendant has also monopolized all the various other flexible packaging materials as espoused by the defendant. Any other view would make a monopolist defendant immune under Section 2 of the Sherman Act and would be a virtual repeal of that Section. Such was not the intent of the Congressional framers of this Act.

Mr. Gesell. Your Honor, would it be convenient for me to start after the noon recesss?

The Court. Yes. Will you finish this afternoon?

Mr. Gesell. Yes. I don't think I will take any longer than Mr. Renninger did.

The Court. Recess until 2:15.

(At this point a recess was taken until 2:15 o'clock P. M., the same day.)

7092 2:15 O'Clock, P. M., the Same Day.

Present: As before noted.

Mr. GESELL. In a way, your Honor, I somewhat regret that it falls on me to be the last to talk at the end of these long days of trial where you have listened so patiently to both of us and both sides. This issue is, however, a very vital one and I am going to try to state in some detail our understanding of the cases and the theory on which we are proceeding.

This issue was labeled on the argument of Mr. Renninger as a collateral issue, but, our point of view we think it goes to the heart of the case.

The determination of the relevant competitive market is an essential and a preliminary step in the trial of any anti-trust monopoly case, as the Supreme Court recognized as late as Columbia Steel. It is an issue that we framed in our pleadings and it has been in this case, and if we hark back to the opening days at a time when the Government did not appreciate the force of the defense we will find that the Government recognized that the determination of the relevant competitive market was an essential first step. On the opening the Anti-trust Division made that clear in the concessions to the Court, and I quote from the opening of the Division:

7093 "The problem of market control perforce necessitates resolution of a variety of economic conditions attendant upon the industry. The character and nature of the marketplace and its participants must be ascertained."

Skipping a bit, "This economic analysis of the position of the defendant in its market setting is the key to measuring the degree of its control." And there are many statements of the same ilk, and we must in this case face up to what is the relevant competitive market. The Anti-trust Division says it is the cellophane market. We say it is the flexible packaging market and that that market and the cellophane market are one and the same thing, and our offer of proof is directed to that issue.

Now, consider for a moment, if your Honor please, where we are on the close of the plaintiff's case. In the words of the Division: "All of the practices complained of have ceased, but the defendant is sitting on top of a big, fat monopoly, 75%." Well, I ask your Honor, 75% of what? The Division constantly talks about size and percentage, but the initial question is What is the relevant market? and this proof, speaking broadly, is directed to the proposition that if you look at the greater market in terms of economic and business realities and competitive circumstances, the monopoly is the flexible packaging material market, of which cellophane is but a part, and the 75%, like many of the other allegations
7094 in the case, becomes a myth.

Now, this is a matter of degree, your Honor, but it is not one to be decided by pure theory and a priori reasoning. The notion that without regard to the factors that are operating in the marketplace the Anti-Trust Division can refer to the industry or refer to the market and by its own uncontrolled discretion determine what is perhaps the basic issue in a monopoly case is, of course, not the law and never could be the law.

7095 There are questions of reasonableness and questions of business fact to be dealth with, and to talk about the cellophane industry or the markets or about the uniqueness of cellophane with a record which is silent on all of those subjects just is not meeting the obligation that the statute placed upon the Anti-Trust Division in prosecuting.

We are in a period where more and more of these cases are being brought and this issue is becoming increasingly important in the land and in the courts. If it is true that the Government can determine the market simply by naming on an a priori basis without any business or economic proof the subject matter of its litigation, without regard to the facts that are taking place in that market, then there is no end to this doctrine, your Honor, they offer no test to the Court except dollar amount, and as long as the dollar amount is substantial, that is all they need. You could have a monopoly of Buick cars, you could have a monopoly of Pepsi-Cola, you could have a monopoly of canned condensed goat milk, or Wilbur buds or strawberry ice cream. There must be some tests that have to be applied in a trial of these cases which will enable a determination on a realistic business basis of what is in the market.

It seems to me that a statement I would like to read from Eidel-
man on questions of integration which appeared recently in
7096 the C. C. H. Service is very much in point. He says: "But
if share of the market is relevant, we are forced to ask, share of what market? By indicating that no fixed percentage can be a legal standard we implicitly admit that the extent of the market is no clear-cut observable phenomenon. It depends on the competition of substitute commodities and services and they in turn depend on relative prices. So we must go further and inquire into the price history and technology, not in order to decide whether prices are reasonable or in order to hand out good marks or bad marks for progressiveness, but because competition is something we can only infer from behavior in the market place and the workshop. It is no mystical thing in itself existing apart from its manifestation. It is not a cuff link to be found by turning up the rug at just the right spot. It is a conclusion to be reached after a great deal of toil, tears and sweat. Either we recoil from the labor, take refuge in a formula like exclusion of

competitors and wind up excluding competition, or else we face the job and devise methods for doing it as expeditiously as possible."

And what we say to your Honor on this offer of proof is that on the facts of this case and the issues as framed by the Government, there is placed upon the Court the duty of determining what is the relevant market and what are the competitive factors operating there.

What does the Government say to this? They offer no test, except that it is what they say it is. But they offer
7097 two arguments. They say, there is a substitute for everything, and this will make everybody immune from prosecution under the monopoly statutes. We think neither of these arguments is sound because obviously in the first place if you are going to look at the market, not all substitutes can just come in helter-skelter without regard to their actual functional interchangeability, without regard to their prices, without regard to what happens in the market place. And wherever the Government can show that because of the conditions in the market place there are no products, or are only certain products which are functionally interchangeable, competitive as to price, it can find a monopoly case there. But it cannot just by reaching out and saying "Buick cars" or "Cellophane" escape the necessity of looking at that market.

Obviously, your Honor, each case is different, and it is very difficult to argue by way of analogy because I know of no case like this cellophane case in terms of the degree and nature of the competition. So that is why the inquiry must be made in each case—and it is an issue of fact—the inquiry must be to, what are the realities of the market place? Who are the customers? What do they buy? What articles supply the customers' needs? What articles compete as to price? What is the physical nature of these products? What is the question of their supply? And what is the resulting power of the manufacturer of a par-
7098 ticular product? We say that cellophane is not a separate part of commerce if we can establish, as is the fact, that there are other functionally interchangeable products that are sold at the same time, in substantial quantities, to the same classes of customers, for the same use, at comparable or lower prices. And we have so pled in our answer.

The question then arises, if that is the test that we are proposing, are there reasons for that test? Is that a test that has no foundation in law or reality? Or is it a test that makes sense? We think it is the proper test because throughout this case and throughout the development of the monopoly decisions, the ultimate issue that the Courts have directed their attention to is whether monopoly power exists. That is why we have the long recitals in the complaint of monopoly power as to price, as to quality, as to consideration, as to quantity, and the monopoly power was the evil that the statute was directed against. It was to strike down the situation where a single supplier or two suppliers had such a corner on the market that free from competitive influences they could gouge the public.

And so the question of this market and market test go directly to the central issue of a monopoly case, namely, monopoly power. And we say that our test is the proper test because if the so-called monopolist meets competition day to day in the market place, from not theoretical substitutes but actual interchanging materials
that are merchandised in the same way and to the same
7099 people for the same purposes and if the price of those other
goods is such and the qualities of the other goods are such
that du Pont lost business, that it must compete, that if its price goes up it is not going to sell, then you have the absence of those facors which demonstrate monopoly power. And we are concerned, your Honor, not with theorizing but with fact. In fact, what about price power? In fact, what about quality power? If du Pont raises the prices, does it lose business to these other materials? If it makes the quality deletreious, do the other materials step in? Must it compete as to price, as to research, as to salesmanship? Those are the questions we are talking about. And if these functionally interchangeable materials are present in the market place, actually competing, and the price conditions are as we say they are in this offer of proof, then the power does not exist.

7100 So this goes to the heart of the effect of the alleged monopoly, its impact on the marketplace, and of whether or not one exists.

Let us see what was said on the opening with respect to this issue. I quote:

"It is not too much to say that the current interpretation of Section 2 presents the central issue of the doctrine in the entire field of anti-trust law, the concept of market control. The power to affect prices is inextricably conjoined with the problems pertaining to market control. It is, in fact, a principal manifestation and evidence of an ability to control markets. The Government's position in this regard is that at all times the defendant possesses and exercised absolute power to fix arbitrary and non-competitive prices for cellophane, caps and bands. It was possible for the defendant to ignore the interplay of influences present in a freely competitive market."

That is the issue, your Honor, to which we are directing this proof. It is, of course, also relevant to questions of intent, but those are so obvious that they don't need discussion.

Now I would like to discuss the cases and see if from a discussion of the cases I could not put these authorities a bit more into their proper context.

7101 We have it in the Columbia Steel and other cases that the power to raise prices free of competitive influences is one of the controlling factors. The Government can cite no case where proof of this kind was excluded.

The effort was made to cite the National City Lines case today, but the National City Lines case is not our situation at all. The question there was not whether the goods sold to Lines competed with National's sales of such goods, but only whether the sales to the Lines was a large enough part of commerce to fall under Section 2. The question of competition was not in issue.

Now, if your Honor please, we think that there are two cases here which sustain this point in particular, and I would like to mention each of them briefly. There are others, but these are two I wish to develop in a bit more time.

The first of them is Judge Hand's decision which we have had talked about from the Government's side in the Corn Products case. That decision more than any other case of which I am aware thoroughly considers the legal and business factors which operate where this issue is raised. The proof was taken there, your Honor, but the defense was not successful and it failed for one simple reason that the so-called substitutes were higher priced than the product monopolized, and Judge Hand said that inasmuch as the product monopolized was lower priced, the monopoly powers still exist, because the competition was not brought into effect 7102 unless the monopolized product increased the price a considerable amount; and there was also some failure of proof as to the extent of the competition. But the rationale of the case is a rationale which fits the facts of this case precisely, and Judge Hand's full consideration of it is most pertinent.

The other case is a case where the defense was successful in the Cracking case in the Supreme Court in 283 U. S. There the court took cognizance of the relationship between cracked gasoline and other types of gasoline, and the opinion has this significant statement:

"In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to say how they could by agreeing on royalty rates control either the price or the supply of gasoline."

They agreed as to royalty rates on cracked gasoline, but inasmuch as it competed in the same outlets with regular gasoline that arrangement as to royalties gave them no dominant position, no position of power.

Now, those two decisions seem squarely in point.

We also rely, your Honor, with considerable emphasis upon the Columbia Steel case tried here and affirmed in 334 U. S. There the court considered the question of the market at length, recognized the difficulty of laying down any particularized rule, 7103 and revised it not only from a geographic aspect, but from a product aspect, and the Government's contention that relevant products were plates and shapes was rejected in favor of the defendant's contention that the relevant products included all rolled steel products.

So we have it in two Supreme Court cases where the defense had been successful and we have a full rationale in Judge Hand's decision.

There are many other cases where this question has come up, and as far as I know, in all of them the evidence has been taken. In the Aluminum case substantial evidence was taken on the District Court level. They considered competition between aluminum utensils and utensils made of enamel, copper, cast iron, stainless steel, glass, and other materials. They considered competition between other materials and aluminum foil. They considered competition between aluminum cable and copper cable.

In United States against Parker rustproof, 61 Fed. Supp., the District Court received evidence as to the competition between defendant's phosphate rustproof coating and other forms of corrosion prevention such as galvanizing, Sheridizing, plating, and other similar processes. The same thing was considered in Hoffman versus Riverside in 55 Fed. Supp.; and, of course, it was considered in many of the cases which the Government relies on.

Now, what about these Government cases, this list of 7104 thirty? some of which are cases where the issue was never raised, but it is a long list and excerpts from the language seems persuasive until you look at the cases, and when you look at the cases you find some very startling additional considerations that show their lack of pertinence to the issues I am arguing here. Most of the cases, to begin with, are geographical cases, your Honor. They are cases concerned not with competition between different products, but whether you can carve out a portion of the United States and consider that as a part of trade and commerce. That was the issue in Yellow Cab. There was no issue in Yellow Cab about competition between these special types of cars and other cars. The discussion concerned the geographic area, and many of the other cases are geographic in

content. The Goldman case, your Honor's decision in the Third Circuit, raised that primary issue. Peto against Howell, the Chicago Corn case, on which they rely, raised that issue. United States against Reading, one of the cases they rely on, raised that issue. Gibbs versus McNeeley raised that issue. A number of them, a large number of them. But I think even more important is that these cases, if your Honor please, were in the main not monopoly cases. They were Section 1 cases, not a Section 2 case such as this, and the court was considering not what is the part of trade and commerce from the point of view of determining
whether monopoly powers exist, the problem we have here,
7105 but the court was considering whether a particular restrictive practice was of such a character that even though it pertained to a part of the trade and commerce of the United States it was an unreasonable restraint that should be stricken down under Section 1.

7106 So we find that the Louisiana Farmer Protective case was a treble damage action, not a case such as we have here. And we find that the Oxford Varnish case was a patent tie-in case, not such a case as we have here. That the Mandeville case was a price-fixing case. And so it goes. That the Story Parchment case was a treble damage case. That the American Tobacco case was a price-fixing case. That the Baush Machine case was a treble damage action. And when we look at the cases, we find that the language the Government is relying on is language that comes in a wholly different context from the issue which we are urging on the Court here—not the issue of monopoly control, monopoly power, but the issue of whether a particular restraint was of sufficient magnitude in terms of a part of the commerce, whether it be geographic or dollar wise, as to be unreasonable within the context of the decisions.

And in Standard Oil in 283 and in Columbia Steel and in Aluminum, and other cases, this evidence was taken and the reason is obvious, that until the Court can determine by a full appraisal of the evidence what the competitive factors are, what the economic factors are, what the business realities of the situation are, it can't determine whether the public is being hurt, whether powers of a monopoly exist; it can't appraise the intent of the parties in their transactions in that market, and the case can only be discussed in terms of theory rather than fact.

7107 These cases are fact cases, your Honor. And they each turn on their own particular facts, and not a single case that I have cited to the Court and not a single case that the Government has cited to the Court is a case which has facts like the facts which exist on this offer of proof as to flexible packaging materials. And since each case must be on its facts, the evidence is taken and has to be considered, and here the facts cry out for consideration on our offer. This is no argument; this is solid proof which we are prepared to present and which will be most pertinent to many issues of the case. And if your Honor rules that this is irrelevant and immaterial, your Honor will have ruled that the determination of the central issue in all monopoly rests entirely in the uncontrolled discretion of the prosecuting official who chooses to bring the particular case.

Mr. **Minicus.** When Mr. Gesell thought he was the last speaker——

The **Court.** I was a little dubious about that.

Mr. **Gesell.** I was, too.

Mr. **Minicus.** Maybe he thought he had the affirmative when he started this morning. This was his rebuttal.

Your Honor, there isn't a great deal of doubt that the issue before us is an important one. The arguments made by the plaintiff and those by the defendant today have been almost antithetical. They have only met on the border lines, inasmuch as

7108 one was confined almost exclusively to the law and the other was almost entirely factual. And from these diverse arguments which haven't met very closely, this extremely important decision must be made.

It is my opinion, your Honor, that there is presented here a question the ultimate resolution of which will be the most momentous in this entire case. And the Government doesn't find the importance of the outcome to depend upon whether recourse may be had to substitute materials for the purpose of justifying the monopoly that we have shown to exist here. We are not worried about that. On that score I have perfect faith and am completely without trepidation that we have them on both the law and the facts. The important decision that will have to be resolved here today, if your Honor please, resides in the means by which that conclusion is reached. In other words, are we to wade through this great mass of detail, as we saw it today, the statistics and all the trivia that was dumped in with it only to learn in the end what should be so obvious at this moment, that the whole thing is futile?

There can be no doubt, your Honor, that the mass of cases cited by Mr. Renninger are unanimous in one regard: each case looked to a narrower delimitation of the market alleged to be monopolized. In none of those cases and in no other will a decision be found which has a tendency to widen the market beyond the territorial product alleged to have been monopolized.

7109 I would like to say parenthetically in that regard, the Department of Justice does not decide what markets are to be monopolized or found to be monopolized. Most of the time it is done in the Supreme Court, and we take our orders from the opinions of the Supreme Court, and from no place else.

I repeat, your Honor, that the plaintiff's position is not based upon the authority of a single case nor even a mere scattering of cases but upon a solid unbroken line of decisions comprising approximately thirty cases that were presented to you today.

They have just been attacked. On what grounds were they attacked? That every one or most of them or something about them dealt with geographical delimitation of the market. The only answer I have to that is to urge your Honor to read these cases.

The Court. Mr. Minicus, who determines what the market is?

Mr. Minicus. There is no doubt that the Court in the ultimate analysis——

The Court. In order to do that it must review facts, must it not, in order to see what the market is?

Mr. Minicus. Well, the Court is very often guided, if your Honor please, by past decisions of other Courts, and here our position is that the past decisions of all these other Courts are to
7110 the effect that no other product comes into the market other than the one alleged to be monopolized.

The Court. Well, that is because—we will take my Goldman case, for example. We were there dealing with moving picture theatres and first run films.

Mr. Minicus. That is correct.

The Court. But we had the basic facts upon which we made our analysis of the charge of monopoly by looking at the market. Now, in this case are you going to fix the market as cellophane and am I to stop there and accept that as the market of just being cellophane? Or am I going to listen to the caveat which Mr. Gesell has raised by saying, "Judge, I don't want at this time to have you determine what the market is, but I do want the opportunity of giving my version of what I think the market is"?

Mr. Minicus. Well, if we come right down to that, your Honor——

The Court. Why should a defendant in an anti-trust suit, or in any other suit, be precluded from offering what he considers to be his version of the fact in controversy?

Mr. Minicus. Because in this case the facts that the defendant desires to prove are entirely against the express intent of Congress, where they said, "in any line of commerce" and these Courts have construed——

The Court. That is a relative clause that can receive a
7111 number of interpretations, it would seem to me, dependent upon the subject matter of the litigation.

Mr. MINICUS. It has never received any interpretation but one, and that is the point I am offering now, and that is the point that these 35 cases hold for, that the one interpretation in that has always been, there has been a single product in a line of commerce and substitutes, as I will show in a few moments, have been disregarded time and time again. Those are the words we have to construe here today, your Honor, "in any line of commerce" and that is what, starting with the Standard Oil case and coming through these thirty cases the Courts have done, and they have found that "in any line of commerce" meant the one product that was alleged to have been monopolized in that case and if it wasn't monopolized then it was out. But they did not consider substitutes to find out whether it was monopolized. They have never done that. No Court has ever done it.

The COURT. That argument never seemed to deter the Supreme Court from making a decision because some other Court or its own Court could not——

Mr. MINICUS. I think I will show in a few moments, or Mr. Renninger has shown, that the Supreme Court has already passed on this point. I would like to stop here.

I was discussing Mr. Gesell's rebuttal of our cases and I point to the Yellow Cab case. Mr. Gesell can interpret the Yellow 7112 Cab case all he wants. Mr. Renninger pointed out in his presentation of the Yellow Cab case that there was a geographical limitation involved in that case, most certainly, four cities, but anyone that listened closely heard Mr. Renninger say very plainly and point out the Court's remark, that it is obvious, everybody knows that more taxicabs are made by private automobile manufacturers than happen to be made by this one person specializing in the manufacture of taxicabs, but they didn't consider those other cars made by other manufacturers; they were looking at these taxicabs, made to be such right here, and there was nothing geographical about that.

Now, again on these cases that Mr. Renninger has cited, if your Honor will look at them—and it will only be necessary to look at the first few paragraphs of the cases—it will be quite apparent that the vast majority of them were founded on Sections 1 and 2 of the Act, not Section 1 of the Act at all. We were very careful about that. We don't really see the great pertinence of the point, but most of these cases that we have selected here you will find are in Section 2. We will admit one thing about most of these cases, and we have never tried to hide it, that in most of them the evidence relating to substitute materials was allowed at the trial, but in every instance it was either ignored by the trial Court or completely rejected on appeal, and I say that without pointing to a single exception.

7113 Now, recently, out in the Seventh Circuit, Judge Lindley had seen this thing going on for a long time, and a very similar situation. I won't argue, your Honor, that the National City Lines case is directly in point, but there are a great many elements in common. In that situation Judge Lindley, in sending the case back to the District Court said, "Enough of this. You excluded this kind of evidence at the trial and you are perfectly right. It is not to be considered on the retrial."

Now, we offer to the Court the fact that opposed to this great wall of cases that Mr. Renninger has presented to the Court this morning, the defendant cannot present a single decided case to the contrary. I think the Columbia Steel case was mentioned about six times. That isn't six cases, your Honor. That is one Columbia Steel case. And if your Honor will look at the Columbia Steel case, you will find that the Columbia Steel case supports exactly the position we are striving for here. The Columbia Steel case departmentalized each of these different kinds of fabricated steel and looked at each in a separate market, and that was all steel, no substitutes.

The Corn Products case is admittedly on our side. We cited it ourselves this morning.

Now, this gasoline cracking case, Standard Oil of Indiana. In the gasoline cracking case you had nothing but gasoline and not two different kinds of gasoline either. They happened to be
7114 made by different processes, but they were the same old gasoline. It was a process case. There was no distinction there.

Let's talk about that Alcoa case that Mr. Gesell brought up. I will admit that Judge Caffey in the trial Court of the Alcoa case permitted everything to come in, and he sat for three years doing it, and after he had listened to that staff for three years, and Judge Caffey was convinced there was a lot in this argument, it went up to the Circuit Court for the Second Circuit, which was then sitting as a court of last resort by special statutory enactment, and Judge Hand looked at it and he summarily cast it all aside and that was the end of it. All that stuff that Judge Caffey had listened to through those many months did not even get a word from Judge Hand.

He talked about secondary aluminum, in other words, aluminum itself, but copper, zinc, lead, all those things went right out the window when Judge Hand got to it. And a good part of those three years was entirely wasted with this problem.

Now, there is an adage to the effect that when the law is against a person he discusses the facts. So here the defendant has chosen as its weapon a factual argument. But what sort of facts has he discussed? Are they facts that are in evidence? Are they facts

of common knowledge? Or are they but pontifications of Mr. Gesell? We have been told a lot of things here this morning but no proof of anything. Certainly as nearly as I can see they
7115 are not facts addressed to a further interpretation of the Sherman Act, nor are they facts concerned with the monopolization of cellophane and caps and bands. He desires to discuss a hypothetical market. He berates us for setting up a market and then sets up another one in contradistinction to it. And this market that he sets up has expanded beyond all reality. And he claims in that market everything—everything that was ever, ever used to wrap anything is in competition with cellophane. This is pure unadulterated fiction.

So in rebuttal we intend to stop for a moment and depart from our original plan and discuss a few facts ourselves as the facts really exist. We won't make them up and they won't be my pontifications.

The first one is, and this fact is crystal-clear, that beyond the confines of this courtroom, everywhere else but right in this courtroom, du Pont does not consider and never has considered that any other product was in competition with cellophane. I think we have been bilked and I will support that right now with a document that is in the record as evidence. I have read this once on Mr. Gesell's insistence. This time I would like to read it at my own preference. This is a document that is a competitive report of the du Pont Company for the year 1946.

7116 This is a document that is a competitive report of the du Pont Company for the year 1946. From page 2 of that document:

"Non-cellulosic films partly stimulated by special war applications and now greatly encouraged by the severe undersupply of cellophane have recently shown an increased rate of activity."

I ask your Honor's attention to that severe undersupply of cellophane which our proof is going to show, now that the case goes down to the date, existed from 1940 through 1947, 1948, 1949, and 1950, and is as bad today as it was at the end of the war. That is how much of a war-time shortage that was.

So according to this, these non-cellulose films have been stimulated by a severe undersupply of cellophane.

I continue reading:

"They include Goodyear's Pliofilm, a pre-war product temporarily delayed by the lack of natural rubber, Goodyear's Vitafilm (vinyl), polythene film by Visking and several other producers, Firestone's Velofilm (vinyl) and Reynolds Metals aluminum foil and others."

Now, Mr. Gesell had a great deal to say about prices in this market. I invite your Honor's attention to the next statement:

"Generally speaking, the price of these new films limits
7117 them to special uses including fabric replacement in shower
curtains, tablecloths and other non-packaging utilization. Pliofilm selling for around 85 to 95 cents per pound, about double the price of cellophane, is making some headway in produce, meat and poultry packaging largely due to the lack of cellophane. We estimate current Pliofilm production at about 150,000 pounds per month.

"Polythene film is used in frozen food locker bags, household utility bags, etc. The Plastics Department estimates total polythene film production by all producers at 5,000,000 for 1946.

"Aluminum foil containers are being used in the frozen food field, the wrapping of butter, etc. Reynolds is very actively promoting a laminate of aluminum foil and glassine for cigarette packages."

Then we come to the crux of this situation:

"The packaging field is still broadly a domain of cellophane to the extent that the industry is capable of supplying the demand."

Now, what has happened to that market? "The war-time shortage of cellophane has amply demonstrated the utility of the product beyond mere sales appeal. Substantial new uses, including the packaging of fresh vegetables, fresh meats, and bread, are awaiting the availability of additional cellophane.

"The development of waste-free unit packages of vegetables, meats and other commodities for self-service has
7118 stimulated the demand for engineered transparent packaging materials beyond any even recent expectations. The largest potential for cellophane now appears to lie in the food industry which requires very large quantities of film at much lower costs than any of the non-cellulosic films are likely to achieve, in the foreseeable future anyway."

Then there is another one of these documents. If this thing is ever opened up wide we will bring a lot more of this in. I selected these simply to find out where we stand on this factual basis.

This is a very interesting document, your Honor, because this document was written in 1949, just a little over a year ago, and it is an extract from an annual market analysis report of the Cellophane Division for 1948. This document had a very interesting history. We never saw this document until we received the defendant's exhibits which it stated it intended to use in its defense. That is how we got this document, and this is a document that the defendant thinks supports its case, so I would like to look into it for a moment in connection with these substitute products.

The year 1948: "I. Transparent Films.

"The transparent film industry has expanded rapidly, both in types and volume of production, since prewar years."

Now, your Honor, we have a third market. If we keep on we are going to have a lot of them, but here is number three.
7119 The Government thought we had a monopoly of cellophane here, but all day long today we have been told that we have is a market including all transparent wrappers. Now here they are talking about their own market analysis over a year after the complaint in this case was filed, and they talk about a transparent film industry. Now, we didn't hear much about transparency when they were talking about aluminum foil today or some of those semi-transparent or translucent products, but here we have a new market, the transparent film industry. Let us see what goes on in there. I continue reading:

"Not only has the production of viscose films been increased very substantially, but also the manufacture of non-viscose types of which a number of new varieties have been and are being developed. The principal markets for non-viscose films have been competitive with Cellophane only to a very minor degree up to this time. Some are used very little or not at all in the packaging field—others are employed principally for specialty uses where Cellophane is not well adapted—none have been successfully introduced into any of Cellophane's main markets, due to their inherent shortcomings. In all cases, these films are sold at higher prices."

Then we follow a particularized consideration of each of these films, and your Honor will note that they are films contained in that proffer of proof that was made this morning.

The first, and perhaps the most important, if we are
7120 talking about competition with cellophane, is cellulose acetate.

Reading from page 6 of this report:

"It is estimated that 20–25% of the above production (less than 2,000,000 pounds) is sold for uses competitive to Cellophane. The greatest volume use is for laminating (foil, paper, board), a substantial portion of which is also used in packaging."

Then further down the page still under "Cellulose Acetate":

"Du Pont prices were increased during the year on the popular gauges from a range of 65–76¢ to 75–82¢ and are now about midway between Celanese, which is lowest, and Eastman, highest."

That paragraph, your Honor, means that du Pont also produced cellulose acetate film and that its price was part way between celanese and Eastman, and it was between 65 and 76 on one variety and 75 and 82¢ for another.

I point out to your Honor that at this time the price for 300 P. T. cellophane was approximately 35¢, and that for 300 M. T. cellophane it was approximately 43¢.

The next one that the market survey discusses is Pliofilm, and we heard a lot about Pliofilm today. Let us see what they say about Pliofilm outside of this Courtroom:

"Pliofilm is principally a packaging film, but is an 7121 active competitor of Cellophane only in those fringe uses bordering markets that need greater moistureproof protection than Cellophane provides."

And that is what you are going to get in these statistics, your Honor, if you permit this great mass of material to come in—fringe uses.

Again under Pliofilm:

"In comparable gauges, Pliofilm sells at about a one-third higher price than Cellophane on an area basis."

Then the next one is Polythene, and that is also on the list of the proffer. What do they say about Polythene?

"The extent to which polythene will compete with Cellophane depends primarily on whether or not changes and improvements in its present basic characteristics can be made. Today, polythene lacks transparency, is too limp to operate satisfactorily on wrapping machines, it is difficult to heat seal, print and glue, has poor surface slip and high static and is permeable to volatile oils and flavorings.

"Improvements will undoubtedly be made and its competition with Cellophane will increase, but its penetration into Cellophane markets is not expected to any major degree."

That is what they said about polythene outside of this Courtroom.

Let us take another one. We heard about "Cry-O-Vac" this morning. Simply a statement that "Cry-O-Vac" 7122 doesn't amount to much. There isn't a great deal on it. One short paragraph in which we find a statement that "Film prices are in range of $1.10 to $1.25 per pound."

Then Saran. Saran was another one on that list. How about Saran?

"Although this film is superior in moisture protection, no significant commercial uses have been developed, due principally to its high price ($1.09 per pound) and no substantial cost reduction seems to be in sight."

Then we come to a long list of vinyl films made by Goodyear, Reynolds, Bakelite, and National Carbon, and this says briefly, "These films are sold principally in the fabric replacement field and no packaging uses have been developed."

There, your Honor, are the facts of this alleged substitutional competition, not dreamed up by me last night, but the result of a market survey in the defendant company itself, and it is quite obvious that once the camouflage of these hypothetical markets tailor-made by a desperate defendant is pierced, it is found that the myth is here in the substitutes and not in the monopolization of cellophane at all.

We submit at this point that the Court has been provided with more than ample authority in both law and fact upon which to base a decision expunging this entirely specious issue from the record.

With your Honor's permission, there is another
7123 consideration which I believe to be most weighty to a resolu-
tion of this issue. We have seen that the defendant in its proffer has presented eleven other products which it claims are in competition in this theoretical market. Hence where one grew before, twelve products now flourish, and unless decisive remedial action is taken they will all be involved in the proof of this case.

Assuming for a moment that proof and defense with regard to each of these products could be completed in a single courtroom day—and that, of course, is ridiculous—then this issue alone would consume four weeks of courtroom time, this single issue that is attempted to be interjected upon this case bodily here regardless of all of the other things we have to consider.

This Court is well aware of the grave concern currently being manifested by the Bench, the Bar, scholars of the law, and, most important, the citizen sitting in back of the courtroom, and this concern today revolves around the prolonged periods of trial time consumed in the litigation of Sherman Act issues. At the present time we all know corrective measures are being sought in several different directions. It has been my unfortunate experience that a large number of persons are concerned in the belief that the Government, as a party plaintiff in these actions, is wholly the pro-
crastinator. I don't believe this is entirely justified, not
7124 entirely. Every party involved in the trial of one of these
cases has this for a problem. I know and can state that as a fact, because I have participated with persons of authority within the Department of Justice in an earnest endeavor to improve means of shortening these trials, and in each search for one of these means of expediting Anti-trust litigation one conclusion always emerges as self-evident; that is, that there is no single sure-fire cure-all. The scope of the issues on that phase preclude that possibility.

Effective correction must require the purposeful endeavor of all parties engaged in these trials. The parties themselves should understand what they are up against and treat their issues in that light, and if they can't do it then it is incumbent upon the court to step in and say, "Look here, boys, you can't have it, because the judicial system can't stand for this sort of thing." And here we have such an issue. The issue presented to us today is wrong in its

legal premises—we have seen that—and it is thoroughly specious on its facts. I believe I have shown the Court that. But by rendering possible the presentation of endless and ambiguous statistical studies relating to twelve products, it can interminably prolong this trial, because if he brings those in I can assure the Court that I am going to have to bring in a lot of tables and statistics and experts to rebut them, and where are we going to wind up? We are going to wind up with those same admissions
7125 right back there that I read ten minutes ago. They can
never get away from them with all the tables in the world. They can make the du Pont Company stand on its head, but those admissions will stand up, and when I come in with my tables and my experts they will have to be heard, too. They won't be as pretty as that. My client can't afford to throw money away like that.

The COURT. I don't know about that.

Mr. MINICUS. I can only assure you, your Honor, on the budget of this case they can't. Maybe I should have limited myself. This case is the only one I know about. On the budget of this case we can't.

I think there is another sub-heading under this consideration we are on now that the Court might like to consider. The situation we are confronted with right here at this moment is not confined to this trial at all, although it is to us, however, of paramount importance. We are interested in what happens here and the decisions which happen here. Just the other day, your Honor, I received a request for the Court's earlier memorandum on this point in this case from the Government staff engaged in the Investment Banking case. My consternation was great. Investment Banking case, substitutes—my goodness, have they found a substitute for money? But we sent them up the opinion and we found out there has now been raised—we don't know
7126 whether it is seriously because of what happened here or
what, but there has now been raised this substitutional defense in the Investment Banking case; and, strangely enough, at the same time, as Mr. Gesell pointed out, these issues are being raised in one case after another around the country, and word seems to be getting around "That will do it, boys; try that one." The drowning monopolist has found a new straw to clutch, and unless this perversion of the Congressional intent is halted in its incipiency, the public interest embodied in the Sherman Act will be temporarily and very seriously prejudiced.

7127 I say temporarily because to my mind the Supreme Court,
off its reasoning in the Farmers Guide and Yellow Cab cases, is certainly going to ultimately expunge this nonsense about competition from substitutes. I don't think there is any doubt

about it because there isn't a decision out of the Supreme Court that points in any other direction but right at it.

However, it may be several years before the issue is again raised in the Supreme Court. In the meantime, monopolistic defendants will continue to load records and transcripts with this specious evidence. Overworked Courts will be further burdened, trials will be considerably prolonged, and other litigants waiting their turn on the trial calendar are going to be seriously prejudiced while this stuff goes in in the light of admissions such as we had there, to prove this completely fictitious issue. We are going to come out at the very door we came in at this morning, whether it is six months or a year from now, your Honor.

Many decisions in the past have recognized immediately and corrected misconceptions of the law and abuse of legal processes of this nature. Offhand I think of Judge Cardozo with his decision in Buick v. McPherson, where he saw something wrong and corrected it like that; Justice Clarke in the Motion Picture patents case; and not least, by any means, Justice Brandeis in Erie v. Tompkins—and that is what we need here.

7128 At the present time certain corporate defendants, powerful defendants, are striving mightily to delay the consequences of their unlawful practices by means of this recently discovered escape hatch. And the place and the time to slam it shut is here and now, when the opportunity presents itself to act effectively on the basis of evidentiary inadmissibility.

Thank you, sir.

The Court. Do you still want to be the last one to speak, Mr. Gesell?

Mr. Gesell. I certainly don't.

The Court. I want to study over your arguments for a day or so, but I will have my decision ready, I suppose, by the middle of next week on this phase of the case. Counsel will be advised.

Adjourn Court.

(At this point the trial was adjourned to Wednesday, October 10, 1951, at 10:30 o'clock a. m.)

7129 In United States District Court

[Title omitted.]

7130 *5th trial memorandum*

(Filed June 12, 1951)

Leahy, Chief Judge.

There is before the court defendant's Offer of Proof No. 1, relating to competition between cellophane and certain other products, as to which the Government had made objection on the grounds of materiality and relevancy.

Defendant duPont in its offer of proof seeks to show cellophane is in competition with other flexible packaging materials. Defendant contends the offer of proof is relevant and material to three "major issues" of the case: (1) intent; (2) monopoly power; and (3) description of the market itself. The nub of defendant's position is that the market to be examined in order to see if monopoly exists is the flexible packaging industry.

The Government opposes defendant's proffer of proof and asserts the charging paragraph of the complaint* alleges a monopoly by defendant of trade and commerce in cellophane and caps and bands and not that defendant has monopolized all markets in the packaging industry. Plaintiff contends that cello-
7131 phane is a distinct commodity, or product, and that cellophane is not in competition with other packaging materials as a matter of fact or as a matter of law. Thus, plaintiff argues, defendant's offer of proof is neither relevant nor material and, as a matter of law and fact, I should not consider any of the evidence which is embraced in defendant's offer. In contradistinction to defendant's view, plaintiff says the market is cellophane and to permit defendant's offer of proof would be to expand the market "beyond all reality".

Having heard argument of counsel, on May 31, 1951, on the relevancy and materiality of defendant's offer of proof, I am now ready to announce my decision:

1. Plaintiff's objection to the defendant's Offer of Proof No. 1 is overruled.

2. It is not decided by this ruling what particular evidence may or may not be admissible as the trial progresses nor what weight shall be given to any particular evidence which may be admitted.

3. What is decided here is that defendant should have
7132 the opportunity of presenting its theory as to what the relative competitive market involving cellophane is. It is understandable that defendant should be afforded this opportunity since the Government has been heard on its theory of market and the market issue is considered by both sides to be crucial in the determination of this case.

4. If counsel desire a more definite guide on this present ruling, an order may be submitted containing such provisions counsel consider appropriate and necessary. Otherwise, this ruling now made will stand.

PAUL LEAHY, *Chief Judge.*

At Wilmington: June 12, 1951.

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*Paragraph 21.